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746-668—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

FEDERAL POWER COMMISSIONER, PETITIONER

v.

AMERADA PETROLEUM CORPORATION

AND

SIGNAL OIL AND GAS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on July 15, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App. A, *infra*, pp. 11–27) is reported at 334 F. 2d 404. The opinion and orders of the Federal Power Commission (R. 243–265, 284–285) are reported at 30 FPC 200 and 677.

JURISDICTION

The judgments of the court of appeals setting aside the Commission's order was entered on July 15, 1964

(App. B, *infra*, pp. 28–29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

When a supplier sells natural gas to an interstate pipeline company, which commingles it with gas from other sources and uses some of the mixture for local sales, but sells the bulk of the mixture in interstate commerce, may the supplier and pipeline avoid the jurisdiction of the Federal Power Commission over sales in interstate commerce for resale by stipulating, contrary to the physical fact, that all of the supplier's gas sold under that contract will be consumed within the State?

STATUTE INVOLVED

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, provides in pertinent part:

> SECTION 1. (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
>
> SECTION 2. When used in this Act, unless the context otherwise requires—
>
> * * * * *

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

STATEMENT

This case involves the jurisdictional status, under Section 1(b) of the Natural Gas Act, of sales which Amerada Petroleum Corporation and Signal Oil and Gas Company are making to Montana-Dakota Utilities Company.

Montana-Dakota is an interstate pipeline, selling and transporting gas in Montana, North Dakota, South Dakota and Wyoming. The lines here in issue form a continuous interstate loop, most of which is located in North Dakota, but which extends also into Montana and then connects with the company's Cabin Creek Compresser Station and an adjacent gas storage field. (See Map, *infra*, App. A, p. 15.) A new segment of that loop, which was certificated in the first phase of this proceeding, runs between Bismarck and Minot, North Dakota, the eastern ends of the older segments of the present loop.[1]

[1] The proceeding arose out of certificate applications filed by Montana-Dakota, Amerada, Signal, Lyda Hunt-Herbert Trust and TXL Oil Corporation (now Texaco), as well as one by Continental Oil Company which is unrelated to the present issues. The requests of Montana-Dakota for certificates to extend its interstate lines, and of Hunt-Herbert and TXL to sell gas in interstate commerce for resale at 16 cents per Mcf, were approved by the Commission which adopted its examiner's decision on June 1, 1962 (R. 190, 211). That decision severed

The purchase contracts.—In North Dakota, Montana-Dakota purchases the bulk of its natural gas from Amerada and Signal at the tailgate of the Tioga processing plant which those two producers jointly own. With each producer, it has two contracts, one labeled "North Dakota" (R. 126, 154), and the other "Interstate" (R. 39, 97). All four agreements call for an initial price of 17 cents per Mcf, with three one-cent escalations over 20 year terms. The "North Dakota" contracts provide that all the gas sold thereunder will be consumed within the State of North Dakota (App. A, *infra*, p. 16; R. 130, 158).

The "Interstate" contracts are in terms applicable to all gas produced in the contract area which is sold and delivered by Amerada and Signal to Montana-Dakota and transported outside of North Dakota for resale (R. 45, 105). They require Montana-Dakota to take or pay for specified quantities of residue gas if available, less the quantity of gas which it pays for under the "North Dakota" contract (R. 43, 103). Moreover, Amerada is to attempt to make available

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applications of Amerada and Signal from the previously consolidated proceedings, thus leaving open (1) whether certificates for admittedly jurisdictional sales should be conditioned so as to permit an initial price of 16 cents rather than the 17-cent contract price, and (2) the Commission's jurisdiction over contracts claimed to relate solely to intrastate sales. Thereafter, the Commission granted a motion filed on August 21, 1962, by Amerada and Signal to sever the price issue from the jurisdictional question, the producers accepting the 16-cent price condition and, pending decision on the jurisdiction issue, agreeing to file their claimed intrastate contracts as rate schedules, subject to their right to contest an unfavorable decision on the jurisdictional question (R. 214).

under the "Interstate" contract 25,000 Mcf per day of gas from gas wells it operates (R. 101).

In addition to these purchases, Montana-Dakota buys gas from Hunt-Herbert at its North Tioga gasoline extraction plant and from TXL at its Lignite gasoline extraction plant under contracts requiring it to take or pay for all available residue gas. Both of these plants are located to the north of the Tioga plant where the Signal and Amerada gas is received.

Amerada and Signal applied for certificates of public convenience and necessity for the "Interstate" sales, but not for the "North Dakota" sales, which they claim to be non-jurisdictional (App. A, p. 16).

The facts of gas flow.[2]—The gas received by Montana-Dakota from Hunt-Herbert and TXL flows only westward toward the pipeline's Cabin Creek compression station in Montana. The daily quantity taken from those two producers remains fairly constant, about 5,000 Mcf from Hunt-Herbert and 10,000 Mcf from TXL. In contrast, the larger volumes supplied by Amerada and Signal are transported in two directions from Tioga, one portion flowing westward toward Montana and the remainder eastward toward Minot. On a winter peak day, Montana-Dakota was expected to take about 55,000 Mcf from this source, and on an average summer day about 45,000 Mcf.

On a peak day in the winter of 1962–1963, Montana-Dakota was expected to transport a total of 20,000 Mcf westward from Tioga, including 15,000 Mcf of Hunt-Herbert and TXL gas and 5,000 Mcf of Amerada-Signal gas. Of this commingled stream,

[2] See R. 7–13, 232–234, 248–249.

approximately half (10,200 Mcf) would be consumed in North Dakota before reaching the State boundary, while the remainder would flow on into Montana.[3] Of the 5,000 Mcf contributed by Amerada and Signal to this commingled stream, 100% was to be attributed to the "North Dakota" contracts and thus, under the contract stipulation, deemed to be consumed in North Dakota. To give effect to that stipulation, it is necessary to assume that only 5,200 of the 15,000 supplied by Hunt-Herbert and TXL, or 35%, would be consumed in North Dakota while 9,800 would flow into Montana. The Commission found (R. 250) that "it is apparent that a portion of the Amerada and Signal gas [sold under the North Dakota contracts] is transported and sold to purchasers within Montana while some of the Texaco and Hunt-Herbert gas is used within North Dakota."

Similarly, on an average summer day, Montana-Dakota was expected to transport about 28,000 Mcf westward from Tioga, of which about 13,000 Mcf, or 46%, would be supplied by Amerada and Signal. 1,680 Mcf of this commingled stream would be consumed in North Dakota and 100% of this amount was to be attributed to the "North Dakota" contracts of Signal and Amerada. Here again, therefore, to give ef-

[3] The other 50,000 Mcf of gas supplied by Amerada and Signal on peak days would flow eastward and be consumed within North Dakota. Montana-Dakota's peak day requirements on that portion of its system would, in fact, require additional supplies that would be taken from storage in Montana over the southern part of the pipeline loop.

fect to the contract, one must assume that 100% of the 1,680 Mcf of gas leaving the pipeline through the North Dakota taps emanated from Amerada and Signal, albeit those producers furnished only 46% of the commingled stream from which the gas used in North Dakota was drawn.

The decisions below.—The Commission, relying on its decision in *Lo-Vaca Gathering Co.*, 26 FPC 606 (subsequently set aside, 323 F. 2d 190 (C.A. 5), certiorari granted, 377 U.S. 951), held that sales by Amerada and Signal under the "North Dakota" contracts, as well as those under the "Interstate" contracts, are subject to regulation under the Natural Gas Act as sales in interstate commerce for resale (R. 243–265). It distinguished its earlier decision in *Montana-Dakota Utilities Co.*, 16 FPC 401, affirmed *sub nom. North Dakota* v. *Federal Power Commission*, 247 F. 2d 173 (C.A. 8), which had held that sales to Montana-Dakota by Amerada and Signal at the Tioga plant, under earlier contracts and before Hunt-Herbert or TXL had been attached, were non-jurisdictional. The Commission reasoned that in the earlier case all the gas consumed in North Dakota necessarily emanated from the tailgate of the Tioga plant and thus could realistically be attributed to the "North Dakota" contracts of Signal and Amerada; here, on the other hand, as in *Lo-Vaca*, the gas used in North Dakota is withdrawn from a commingled stream and cannot, consistent with the facts of flow, be attributed to any

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particular source. The Commission also expressed the view that its earlier Montana-Dakota decision had been wrongly decided even on its own facts, since the decision "failed to take appropriate account of the fact that the gas as sold and delivered into MDUs pipeline by Amerada and Signal cannot be identified as gas for interstate use or gas for intrastate use, but constitutes a commingled and indistinguishable flow through an integrated interstate pipeline system in interstate commerce * * *" (R. 254). The court below, in setting aside the Commission's determination, rejected the Commission's factual distinction of the *North Dakota* case, *supra,* and relied largely upon the reasoning of the Fifth Circuit in the *Lo-Vaca* case, *supra,* now pending on writs of certiorari, Nos. 46, 47, and 57, this Term. It also held that, in view of its conclusion that the *North Dakota* case was essentially indistinguishable and that the jurisdictional issue had been fully adjudicated there, the Commission was collaterally estopped from raising that issue.

REASON FOR GRANTING THE WRIT

This case presents the same question as to the scope of the Power Commission's jurisdiction over "the sale in interstate commerce of natural gas for resale" as is presented in *California, et al.* v. *Lo-Vaca Gathering Co., et al.,* Nos. 46, 47, and 57, this Term, in which certiorari was granted on June 1, 1964, 377 U.S. 951. That question is whether the parties to a sale of gas may defeat the Commission's jurisdiction by a con-

tractual stipulation, contrary to the physical facts of gas flow, that all of the gas will be consumed within the State where the sale took place. For the reasons set forth in our brief in *Lo-Vaca*, we believe this Court should also reverse the court below in this case. However, since the issue is fully presented in *Lo-Vaca*, which will soon be ready for argument, we suggest that the Court may wish to hold the present petition pending its decision in that case.[4]

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[4] The court below also held that its decision in *North Dakota* v. *Federal Power Commission*, 247 F. 2d 173, collaterally estops the Commission from reviving the jurisdictional issue here. It is clear, however, that the decision of the jurisdictional question in *Lo-Vaca* will obviate the need to consider the lower court's application of collateral estoppel. If the Commission's assertion of jurisdiction in *Lo-Vaca* is sustained, the Court's decision would necessarily have the effect of either (1) distinguishing *North Dakota* on its facts from *Lo-Vaca*, as we urge in *Lo-Vaca*, Brief in No. 57, this Term, pp. 27–33, or (2) overruling the jurisdictional determination in the *North Dakota* case.

If the essential jurisdictional facts are different, collateral estoppel certainly does not apply. If, on the other hand, this Court (in *Lo-Vaca*) were to treat *North Dakota* as incorrectly decided, the change in "legal atmosphere" would plainly make the doctrine inapplicable to new transactions of persons who had previously obtained an incorrect ruling with respect to other, but similar, transactions. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 599–601; *United States* v. *Stone & Downer Co.*, 274 U.S. 225; see *Automobile Club of Michigan* v. *Commissioner of Internal Revenue*, 353 U.S. 180.

Finally, if, contrary to our position, the Fifth Circuit were affirmed in *Lo-Vaca*, the decision below on jurisdiction would be equally valid and there would be no occasion to consider the holding as to collateral estoppel.

CONCLUSION

For these reasons, disposition of this petition should await and abide the Court's decision in Nos. 46, 47, and 57.[5]

Respectfully submitted.

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Federal Power Commission.

OCTOBER 1964.

[5] If certiorari is granted and briefs and argument are required, the Commission reserves the right to argue that the court below erred in holding that the Commission was collaterally estopped to consider the jurisdictional status of the sales of gas under the "North Dakota" contracts.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,445

AMERADA PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 17,492

SIGNAL OIL AND GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petitions to Review an Order of the Federal Power Commission

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[July 15, 1964]

Before VAN OOSTERHOUT, RIDGE and MEHAFFY, Circuit Judges.

MEHAFFY, Circuit Judge.

Petitioners, Amerada Petroleum Corporation and Signal Oil and Gas Company, have perfected this appeal from an unfavorable decision and order of the Federal Power Commission (Opinion No. 395) hold-

ing that its jurisdiction and attendant regulation extended over certain of Petitioners' contracts for the sale of natural gas to the Montana-Dakota Utilities Co. (MDU) under the provisions of the Natural Gas Act, 15 U.S.C.A. §§ 717–717w, which embraces generally the transportation or sale in interstate commerce of natural gas for resale.[1]

The present litigation represents Petitioners' second contest of the Commission's right to regulate those sales of gas produced, sold, transported, and consumed in the State of North Dakota which, during its journey, is commingled in the same pipeline with other gas admittedly sold and transmitted across state lines for resale in interstate commerce.

FORMER CASE

We passed upon the first jurisdictional confrontation in *State of North Dakota* v. *Federal Power Commission*, 247 F. 2d 173 (8th Cir. 1957), in which Petitioners and the Commission opposed the sovereign State of North Dakota's claim of federal regulation. In that case, the Commission found that Amerada and Signal in 1955 contracted separately with MDU for

[1] § 717(b), 15 U.S.C. delineates the jurisdictional scope of the Act:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

the sale of two classifications of oil-well gas processed at Signal's hydrocarbon extraction plant in Tioga, North Dakota. Under one set of separate, but similar contracts, Amerada and Signal agreed to sell MDU "firm gas" at a fixed term and escalating price per thousand cubic feet (Mcf.) for intrastate resale, while selling by different contracts at a lower price and shorter term "dump gas", destined for interstate resale, and described as that portion of the residue gas produced that would be flared except for the sale. Pursuant to Petitioners' four separate contracts with MDU, two gas streams were measured and delivered into MDU's pipeline connecting with the tailgate of the Tioga plant. One stream carrying only firm gas for intrastate consumption proceeded eastward terminating at Minot, North Dakota and serving the communities en route. The controverted stream containing a mixture of both firm and dump gas ran west to Williston, North Dakota, traversing the state line and flowing into a storage field located in Montana for eventual redistribution in several states. In accordance with the firm gas contracts for intrastate sales, all of that gas was withdrawn from the western commingled stream at the intervening town gates before reaching the state line, measured, and resold exclusively to North Dakota consumers. We upheld the Commission's refusal to assert jurisdiction over the firm gas contracts on grounds that:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any

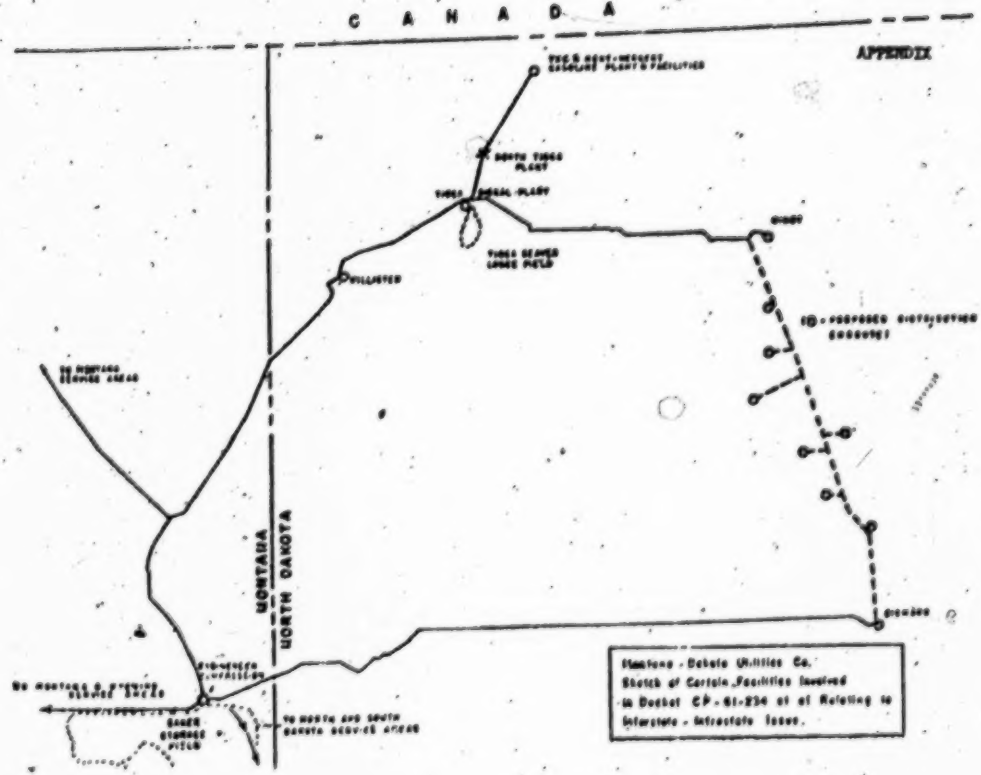
portion of the gas stream has left the State of North Dakota. Accordingly the quantities of intrastate gas purchased by Montana-Dakota under the the 'firm gas' contracts are easily identifiable and determinable."

* * * * *

"The transactions in question covered gas produced, transported, sold, and consumed entirely within the State of North Dakota. They do not constitute interstate commerce in any sense of the word." *State of North Dakota* v. *Federal Power Commission, supra* at 177 and 178.

PRESENT CASE

Subsequent to the execution of the 1955 contracts, Amerada discovered additional deposits of oil and gas-well gas in North Dakota. Since all of the gas heretofore produced to fulfill the intrastate firm gas commitments was required to service the communities along the Williston-Minot line and the dump gas contracts dedicated no reserves to MDU for its expanding markets, MDU, Amerada and Signal negotiated new contracts to supply the increased demands on MDU to service other North Dakota communities. Accordingly, MDU has extended its eastern pipeline from Minot 106 miles south to Bismarck, North Dakota, connecting with an existing pipeline which runs westward across the state line into the Montana storage field. (See map below.)


C A N A D A
MONTANA
NORTH DAKOTA
Montana - Dakota Utilities Co.
Sketch of Certain Facilities Involved
in Docket CP-61-234 et al Relating to
Interstate - Intrastate Issue.

In 1960, Amerada executed two new contracts with MDU for additional supplies of gas to be produced from certain of its North Dakota fields and delivered at the Tioga plant tailgate. The first of these agreements, designated as the "North Dakota Contract", superseded the earlier firm gas contract. It provided for a twenty year term, and an initial price of 17 cents per Mcf. Intended to fill MDU's needs in North Dakota, this contract specified that all gas purchased thereunder "shall be transported, used and consumed entirely within the State of North Dakota" and "shall not, at any time, cover the sale or delivery by Amerada of any gas which is transported beyond the boundaries of the State of North Dakota". The parties did not regard the Commission as having jurisdiction over this avowed intrastate transaction, and therefore no application was made for federal approval. Shortly thereafter, Amerada entered into a so-called "Interstate Contract" with MDU of like duration and beginning price under which it was obliged to drill not more than four gas wells and make available to MDU 25,000 Mcf. of gas-well gas per day. This agreement stipulated that "all gas produced in the Contract Area which is sold and delivered by Amerada to Buyer and which is transported outside of the State of North Dakota and resold shall be sold by Amerada and purchased by Buyer under this agreement". Acknowledging this contract's interstate character, Amerada obtained Commission approval in the form of a certificate of public convenience and necessity.

Accordingly, Signal and MDU executed similar, but separate, "North Dakota" and "Interstate" contracts, but neither Amerada nor Signal applied to the Commission for abandonment of their heretofore inter-

state "dump gas" contracts which were continued in effect for the sale of "flare gas" when available. By this time Amerada had acquired a one-half ownership interest in the Tioga plant where, as always, Amerada's gas, obtained from its own fields, and Signal's gas, acquired from other producers, were processed before delivery into MDU's pipelines.

In addition to the four Amerada and Signal contracts, MDU subsequently contracted with two other companies, Hunt-Herbert and TXL Oil Corporation. (now Texaco, Inc.) for the sale of gas produced at their respective plants, both located less than 50 miles northeast of the Tioga plant. (Map *ante*.) To receive these added deliveries of gas in its system, MDU extended its transmission line from the Tioga plant to connect with the tailgate of Hunt-Herbert's plant and TXL, with its plant farther northeast, constructed a pipeline south meeting the terminus of MDU's extended Hunt-Herbert line. MDU's single contract with both Hunt-Herbert and TXL admittedly covers sales of gas for resale in interstate commerce for which the requisite certificates have already been issued by the Commission. None of the gas from Hunt-Herbert and TXL is transported on MDU's line east from Tioga to Minot, but their entire supply flows westward from Tioga towards Williston and the storage field in Montana. Thus, only Amerada and Signal's gas travels eastward from Tioga while a small portion of Petitioners' gas, commingled with Hunt-Herbert and TXL gas, is transported west from Tioga for consumption by towns along the Williston line. By MDU's utilization of an elaborate metering system at its pipeline's points of input and output, the accuracy of which is unchallenged, all gas produced and sold for consumption in North Dakota is

accounted for and purchased pursuant to the rates and terms of Petitioners' contested "North Dakota Contracts". All the remaining gas traveling outside the state for resale in interstate commerce is measured and sold under Hunt-Herbert, TXL and Petitioners' interstate contracts concededly subject to Commission jurisdicition.

Distinguishing in the instant case its position of lack of jurisdiction in the former case over Petitioners' prior firm gas contracts (intrastate sales), a majority of the Commission in a three-to-two split decision affirmed its examiner's finding here of jurisdiction over the "North Dakota Contracts" primarily because of the added fact that:

> "(T)he Amerada and Signal gas is now commingled with gas from Texaco and Hunt-Herbert admittedly sold in interstate commerce, so that it can no longer be stated with certainty that all of the gas sold in North Dakota came from Amerada and Signal. Indeed, it is apparent that a portion of the Amerada and Signal gas is transported and sold to purchasers within Montana while some of the Texaco and Hunt-Herbert gas is used within North Dakota." Opinion No. 395, *supra* at 1756.

Nevertheless, from a legal standpoint, the controlling issue remains whether or not gas produced, transported, sold, and consumed in North Dakota is divested of its nonjurisdictional properties because during a segment of its journey, it becomes fungibly commingled in a common pipeline with gas destined for resale in interstate commerce.

Prior to passage of the Natural Gas Act in 1938, the states had pioneered the field of gas regulation in protection of the public's interests. Coincident with the industry's cross-country expansion, a regulatory hiatus developed as a result of judicial imposition of

constitutional limitations under the commerce clause on the state's jurisdictional powers. E.g., *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298 (1924); *State Corporation Commission of Kansas* v. *Wichita Gas Co.*, 290 U.S. 561 (1934). This gap in control over certain of the gas distributors' interstate activities at the expense of the public prompted federal legislative intervention. Congress intended its occupation of this field to fill the gap, supplementing, not invading, the powers heretofore exercised by the states. *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).[2] The extent to which the gap was plugged under the Act in providing for an agency to regulate wholesale distribution of natural gas moving in interstate commerce is to be measured by the Supreme Court's decisions defining the states' jurisdiction prior

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[2] The report of the House Committee cited as the basic purpose of the bill, the occupation of a field in which the Supreme Court had held that the states may not act, and concluded, "The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority. * * *" H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (1937).

During the debate on the bill in the House, Chairman Lee, sponsor of the bill and Chairman of the Committee on Interstate and Foreign Commerce, made the following explanatory statement: "This bill takes nothing from the State commissions; they retain all the State power they have at the present time"; while Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, in explaining the bill on the floor of the senate also emphasized it was not intended to interfere with State regulation: "(A)s a matter of fact, the bill does not interfere with the State regulation, in any way, shape or form." See footnote 15, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 510–11 (1949).

to its enactment, not what the Court has since decided or would presently decide. *Federal Power Commission* v. *East Ohio Gas Co., supra* at 472. Therefore, our quest for an answer to the jurisdictional problem raised by the instant proceedings is reduced to the precedential application of the Supreme Court's teachings existent at the time of the Act's passage. *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania,* 270 U.S. 550 (1926), handled four-square the question of the extent to which intrastate gas loses its identity when mixed with interstate gas in a single pipeline, and vice versa. Voicing the Court's unanimous opinion at page 554 Mr. Justice Van Devanter quite logically reasoned:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. *Eureka Pipe Line Co.* v. *Hallanan,* 257 U.S. 265; *United Fuel Gas Co.* v. *Hallanan,* 257 U.S. 277, 281. And see *Hallanan* v. *Eureka Pipe Line Co.,* 261 U.S. 393; *Hallanan* v. *United Fuel Gas Co.,* 261 U.S. 398."[3]

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[3] See also *Humble Oil and Refining Co.* v. *The Texas and Pacific Ry. Co.*, 155 Tex. 483, 289 S.W. 2d 547 (1956), wherein the highest court of the State of Texas, a leader in oil and gas production, shares the Supreme Court's view of "separability" as enunciated in its affirmance of the State Supreme Court of Pennsylvania in *Peoples Natural Gas Co.* v. *Public Service Commission of Pennsylvania, supra.*

The Commission has now retreated from previous agreement with the rationale of *Peoples Natural Gas Co.* when it argued in *State of North Dakota* v. *Federal Power Commission* that intrastate gas does not lose its nonjurisdictional status when commingled with interstate gas in a common pipeline. The Commission justifies its abrupt change of position by turning to its intervening administrative ruling to the contrary in *Lo-Vaca Gathering Co.*, 26 FPC 606, which prior to submission of the instant case, was reversed by the Court of Appeals for the Fifth Circuit. *Lo-Vaca Gathering Company* v. *Federal Power Commission,* 323 F. 2d 190 (5th Cir. 1963). Citing our former opinion and analogous reasoning in *City of Hastings, Nebraska* v. *Federal Power Commission,* 221 F. 2d 31 (D.C. Cir. 1954), cert. denied 349 U.S. 920 (1955), the Fifth Circuit concluded that nonjurisdictional gas could be contractually segregated by volume from jurisdictional gas in the same conduit, despite the loss of molecular identification due to commingling.

We are now assured by the Commission that *Lo-Vaca* was erroneously decided, while our former decision is readily distinguishable. The Commission avers that under the facts of the original case, the gas which flowed westward from Tioga to Williston was obtained from one source, the Tioga plant, and, allegedly, the intrastate gas could be easily traced from the interstate gas in the one pipeline because of their common origin. In its brief, the Commission contends that the distinction now lies in the fact, "Amerada's and Signal's gas in commingled with gas coming from two other sources, TXL and Hunt-Herbert, and it is never possible to identify the gas consumed in North Dakota as necessarily part of the Amerada-Signal stream emitted from the "tailgate of the Tioga plant,

because after flowing in the same pipeline with the TXL and Hunt-Herbert gas, substantial quantities of gas from those sources necessarily will go to the in-state loads." *

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* The Commission fortifies its molecular flow theory by undue reliance on language of the Supreme Court in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515 (1945), reiterated recently in *Federal Power Commission* v. *Southern California Edison Co.*, U.S. 84 S.Ct 644 (1964). These decisions coped with jurisdictional problems arising under the Federal Power Act, 16 U.S.C. §§ 791a-825r, which encompasses federal regulation of electric utility companies engaged in interstate commerce. Tracing the legislative history of this Act, the majority opinion in *Connecticut Power & Light Co.*, *supra* at page 529 reflected:

> "This bill came before Congress prepared by the staff of the Commission, couched largely in the technical language of the electric art. *Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental test.* Technology of the business is such that if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility." (Emphasis supplied.)

Justice Jackson, the Court's spokesman, cautioned that although Congress had the constitutional capacity to incorporate such broad jurisdiction as suggested by the Commission's proposed bill, its repudiation is manifested by the clear, restrictive language chosen which reserves to the states generally regulation over intrastate transmissions of electric energy and local distribution facilities, notwithstanding the fact the latter may contain extra-state energy. See 16 U.S.C. § 824(b). Therefore, as we see the decision, the Supreme Court has not adopted carte blanche a technological transmission test for gauging the Commissions jurisdiction in all instances even with respect to electrical energy, but has subjugated its application to Congress' overriding, less scientific definitions saving to the states their rightful regulatory domain, should a conflict in engineering concepts and legislative wording arise. *Connecticut Light & Power Co.* v. *Federal Power Commission*, *supra* at 531. Moreover, it

In the first place all of the gas sold under the former contracts which traveled in this branch of the pipeline did not originate from one source. Signal had no oil or gas fields of its own, but obtained its

---

must be remembered that the Power Act and Natural Gas Act may not even be susceptible of analogous interpretation in this regard, since the latter Acts legislative history does not allude to any similar jurisdictional proposals by the Commission, nor does its redacted provisions embody a criterion of interstate commerce couched in scientific terms. 15 U.S.C.A. § 717a. Thus this so-called technological transmission test, urged upon us now by the Commission, and referred to in the *Southern California Edison Co.* case, which concerned a different jurisdictional problem involving electrical energy under the Federal Power Act, can, at most, affect the outcome of the instant case under the Natural Gas Act only insofar as this Act's similar provisions preserving areas of state regulation permit.

Wholesale sales of gas produced, transported and consumed in the same state are unmistakably exempt from federal regulation and left to state control, 15 U.S.C. § 717(b). Every molecule of gas which ventures outside the State of North Dakota is sold under Petitioner's "Interstate Contracts" blessed with Commission regulation, while only that measured volume of gas withdrawn from its admixtured state with interstate gas in the westward pipeline and sold for intrastate consumption is conveyed under the "North Dakota Contracts", subject, of course, to state administration. Strict academic obedience to the Commissions suggested molecular flow theory predicated entirely on the organic chemistry of natural gas could conceivably convert the North Dakota sales into interstate transactions. Unquestionably, the commingled western gas stream when it crosses the state line contains not only Petitioners and the adtional two producers' interstate gas, but also indivisible molecular traces of Petitioners' intrastate gas. But to award the Commission jurisdiction over the entire stream on such a tenuous scientific argument would constitute a hypertechnical arrogation of form over substance, subverting Congress' clear intent to reserve unto the state regulation of the North Dakota sales which are wholly local transactions from well head to burner tip.

gas from other producers. Contrastingly, Amerada had its own areas of production. The Tioga plant represented a single distillation station of these combined sources of oil-well gas production, not a solitary source in the literal sense making physical identification of the intrastate gas any easier from the interstate gas. Interestingly, all that need be done to overcome the Commission's avowed "one source" distinction would be for Petitioners and the new sellers to make delivery under their contracts with MDU effective after collection of all their gas into one extraction plant, storage area, or other generic "source" before contractually segregating the destined interstate gas from that intended for intrastate consumpion, thereby obviating Commission jurisdiction to its apparent satisfaction. The fact remains that the controlling issue is not the point of entry into MDU's pipeline of the destined intra and interstate gas or whether both classes of gas are derived from one or several sources. It is the validity of division by contract and volume of interstate sales of gas confessedly subject to federal regulation from asserted nonjurisdictional gas produced and sold in the same state, both transactions remaining unaffected by the fact that common transportation facilities are shared en route to their intended destinations. If the commingling of the interstate and intrastate gas in the former case did not deprive the state of regulatory jurisdiction, then the mere induction of additional interstate gas from other sources would not have that effect now. Admittedly, if the North Dakota Contract gas was conveyed by separate pipeline the Commission would concede its lack of jurisdiction. We cannot fashion our decision on such an onerous and illogical result that would necessitate the building of a parallel pipeline with its attendant

expense, inevitably to be borne by the rate payers, to say nothing of the waste of natural resources during the interim.

We failed to see any overreaching of the division between federal and state jurisdictional boundaries by permitting Petitioners to move a volume of intrastate gas on a portion of its journey from its local source to the in-state burner tips in the same pipeline with interstate gas without sacrifice of the former's intrastate qualities. If the commodity were salt or flour, it could be separately packaged and shipped on the same train for both intrastate and interstate delivery without jurisdictional confusion as to the whole. While the nature of gas does not lend itself to packaging, it has been just as effectively separated by volume through Petitioner's monitored metering system.

The Commission further complains that Petitioners cannot control the reality of their activities by fictional contractual language designed solely to exempt sales from the Commission's jurisdiction. Congress, not the contracts, has exempted the Commission's jurisdiction in this instance. Neither the Commission nor this Court has the authority to expand the Commission's jurisdiction. The realm of federal jurisdiction under the Natural Gas Act is within the exclusive power of Congress and any proposed expansion in the Act's scope should be submitted for congressional action if the Commission feels that there is justification for reversal of the Supreme Court's opinion in the *Peoples Natural Gas Co.* case, as well as the supporting decisions of three Courts of Appeal. If these decisions were erroneously decided and there is any merit to the Commission's present reversal of its former position, or some public good to be accomplished, Congress will lend an attentive ear.

Finally, Petitioners maintain that the principles of *res judicata* preclude the Commission in this proceeding from breathing new life into a dead jurisdictional question heretofore decided by us in *State of North Dakota* v. *Federal Power Commission, supra,* with no intervening change in the prevailing law. Unlike the facts of the former case, this appeal from the present administrative ruling concerns the Commission's passage upon new contracts providing for future sales by Petitioners, as well as additional producers, of different quantities of gas destined to travel over expanded pipelines in the MDU system. We are not therefore faced with an attempted relitigation of the same cause of action in the form of a direct attack upon its resultant judgment so as to bring into play the bar of *res judicata* in its strictest sense. *Egan's Estate* v. *Commissioner,* 260 F. 2d 779 (8th Cir. 1958). Rather, we are confronted with a new claim involving the same parties, although realigned, and the same underlying issue. Amerada and Signal, respondents in the prior jurisdictional adjudication before the Commission instituted by the State of North Dakota, are Petitioners here. The Commission has participated as respondent in both proceedings. Properly characterized, Petitioners' argument is collateral estoppel. Adhering to the Supreme Court's lesson in *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591 (1948) and *United States* v. *Munsingwear, Inc.,* 340 U.S. 36 (1950), we held in *Nelson* v. *Swing-a-Way Mfg. Co.,* 266 F. 2d 184, 187 (8th Cir. 1959), that a question directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action. See also *N.L.R.B.* v. *Brown & Root, Inc.,* 203 F. 2d 139 (8th Cir. 1953);

George H. Lee Co. v. *Federal Trade Commission*, 113 F. 2d 583 (8th Cir. 1940).

In our former opinion we fully adjudicated and decided the same issue recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and that decision as between these parties bars resurrection of the issue again.

The order of the Commission is set aside.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Decree)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17445. September Term, 1963

AMERADA PETROLEUM CORPORATION, PETITIONER

vs.

FEDERAL POWER COMMISSION

Petition to Review Decision of Federal Power Commission

This matter came on to be heard on the Petition to Review the Opinion and Order of the Federal Power Commission dated July 15, 1963, (Federal Power Commission Docket No. C161–1133, Opinion No. 395), and was argued by counsel.

On Consideration Whereof, It is now here Ordered, Adjudged and Decreed by this Court that the Opinion and Order of said Power Commission in this matter be, and the same is hereby, set aside, in accordance with the Opinion of this Court this day filed herein.

JULY 15, 1964.

(Decree)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17492. September Term, 1963

SIGNAL OIL AND GAS COMPANY, PETITIONER

vs.

FEDERAL POWER COMMISSION

Petition to Review Decision of Federal Power Commission

This matter came on to be heard on the Petition to Review the Opinion and Order of the Federal Power Commission dated July 15, 1963, (Federal Power Commission Docket No. C161–1271, Opinion No. 395), and was argued by counsel.

On Consideration Whereof, It is now here Ordered, Adjudged and Decreed by this Court that the Opinion and Order of the said Power Commission in this matter be, and the same is hereby, set aside, in accordance with the Opinion of this Court this day filed herein.

JULY 15, 1964.

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No. 585

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1964

FEDERAL POWER COMMISSION, *Petitioner*

vs.

AMERADA PETROLEUM CORPORATION

and

SIGNAL OIL AND GAS COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Respondent Signal Oil and Gas Company's Brief in Opposition

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IN THE

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OCTOBER TERM 1964

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AMERADA PETROLEUM CORPORATION

and

SIGNAL OIL AND GAS COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Respondent Signal Oil and Gas Company's Brief in Opposition

As late as 1961 the Chief Justice, writing for this Court, warned that if the Federal Power Commission should attempt action calculated to expand its own jurisdiction by forcing all gas transactions into regulated channels, then "we would be forced to agree that the Commission had overstepped its bounds."[1] The Commission's effort to lead this Court into the prejudgment of the case at bar by a decision in the pending *Lo-Vaca* case[2] not only obscures the significant differences in the legal developments of the two cases but is calculated to deprive the Court of the revelation

[1] *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1, 23 (1961).
[2] *FPC v. Lo-Vaca Gathering Co. et al*, Nos. 46, 47, and 57, this Term.

of the Commission's calculated effort to expand its own jurisdiction by just such action. That these are not extravagant charges of over-zealous counsel must be apparent from the same studied observation made just one year ago in October by the United States House of Representatives Appropriations Committee when it reported:

> "The Commission is spending too much time in empire building and *trying to expand its jurisdiction.*"[3]

The petition for certiorari herein (FPC Pet.) reveals only part of the important judicial history of the case at bar, carefully omitting the Commission's refusal to honor the final mandate of the United States Court of Appeals. The case involves an assertion of FPC jurisdiction over gas produced in North Dakota and sold to serve North Dakota communities. The Commission has compelled this respondent to litigate the same issue *twice* before the Court of Appeals and, being unsuccessful there in its demand for greater regulatory power, it now seeks, by urging that the issue be resolved in *Lo-Vaca* and while our case is held in abeyance, to summarily foreclose this respondent without the right to be heard even *once* in this Court. In that posture we respectfully plead, not just for our client's interests but to the end of the soundest possible decision by this Court, that, unless certiorari is promptly denied, we may at least be heard before our cause is judged.

[3]Report No. 824, Committee on Appropriations, Independent Offices Appropriation Bill, 1964, p. 9 (October 7, 1963). All emphasis in this brief is added for clarity of presentation.

OPINIONS BELOW

The *second* opinion of the Court of Civil Appeals for the Eighth Circuit is reported at 334 F. 2d 404 (1964) and is set out as Appendix A to the FPC Pet. in this cause. The *first* opinion of that same court deciding the same issue for these same parties is reported at 247 F. 2d 173 (1957).

QUESTIONS PRESENTED

Because the decision of the court below rests on two independent bases, there are two questions, a proper answer to either of which merits denial of the FPC Pet. Despite the clear admonition of Rule 23 that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court," the initial decisive question is not even presented for review by the FPC Pet. The court below, having in 1957 decided the same issue for the same parties, correctly held that the Commission could not now relitigate the question simply because its appointed membership had changed:

> "In our former opinion *we fully adjudicated and decided the same issue* recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and *that decision as between these parties bars resurrection of the issue again.*"[4]

[4] *Signal Oil and Gas Company v. F. P. C.*, 334 F. 2d 404, 412 (8th Cir. 1964), FPC Pet. 27.

This judicial holding vindicated the position taken administratively by two members of the Commission who wrote herein in their dissenting opinion with reference to the Eighth Circuit's 1957 decision:

> "*That case involved the identical issue presented here and was litigated by the identical parties as those before us now.* * * * *Thus the jurisdictional question has been decided by* this Commission and *the 8th Circuit Court of Appeals.* Surely we are not free to re-examine or reverse each prior decision with the advent of every change in the makeup of the Federal Power Commission. *We are bound by* our own decision and the mandate of the *North Dakota* decision *under the doctrine of res judicata.*" (R. 260-1).

Since the holding on this first question fully supports the decision of the court below and since it is not presented for review by the FPC Pet., it is unnecessary for this Court to reach the second question.[5] The petition for certiorari should be denied at the outset since, no matter which way the second question would be resolved by this Court, the action would not affect the judgment of the court below as it would stand fully supported by the first holding.

Only if relitigation were permitted would it be appropriate to reach the second question. In that event, the second question would be found unfairly stated in the FPC Pet. The Commission's argumentative phrasing of it is best seen by contrasting its loaded question

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[5] *Republic Natural Gas Company v. State of Oklahoma*, 334 U.S. 62, 72 (1948); *Letulle v. Scofield*, 308 U.S. 415, 419 (1940); *Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947).

with the more candid statement by the court below:

Question as stated by the Commission (FPC Pet. 2)	*Question as stated by the 8th Circuit (FPC Pet. 18)*
"When a supplier sells natural gas to an interstate pipeline company, which commingles it with gas from other sources and uses some of the mixture for local sales, but sells the bulk of the mixture in interstate commerce, may the supplier and pipeline avoid the jurisdiction of the Federal Power Commission over sales in interstate commerce for resale by stipulating, contrary to the physical fact, that all of the supplier's gas sold under that contract will be consumed within the State?"	"[The issue is] whether or not gas produced, transported, sold, and consumed in North Dakota is divested of its non-jurisdictional properties because during a segment of its journey, it becomes fungibly commingled in a common pipeline with gas destined for resale in interstate commerce."

We respectfully adopt the statement of that question by the Court of Appeals as a fair and objective presentment. For the lack of those qualities we reject the Commission's statement of the question.

STATEMENT OF THE CASE

Contrary to the impression sought to be left by the Commission's "Statement" (FPC Pet. 3-8), this case does *not* involve sales of gas in fact made in interstate commerce but fictionally described as being made for consumption in the state of origin. Rather it presents a Commission effort, *sua sponte*, to seize control over sales of North Dakota gas actually and honestly made for resale and consumption in North Dakota since 1955 — and to do so simply because the gas is transported from a North Dakota field to the North Dakota communities by a pipeline which also transports gas

sold for resale outside North Dakota. The realities of the delivery and control of this intrastate gas are that it has been physically measured both at the in-put and outlet points by means that are unquestionably sound from an engineering point of view and in complete fidelity to the governing contractual provisions. There is no fiction or artificiality involved here. (R. 3-4, 158). The two members of the present Commission who joined in the effort to take jurisdiction over intrastate sales will recognize authority in the producing state over gas sold for consumption in that state only if an *entirely separate pipeline* is built to transport the intrastate gas. (FPC Pet. 24). The statute of course describes no such jurisdictional dichotomy, nor as pointed out by the court below, does common sense:

> "We cannot fashion our decision on such an onerous and illogical result that would necessitate the building of a parallel pipeline with its attendant expense, inevitably to be borne by the rate payers, to say nothing of the waste of natural resources during the interim." (FPC Pet. 24).

A candid statement of the case, not to be found in the FPC Pet., discloses the crucial facts to be just that simple.

In 1955 Signal Oil and Gas Company (Signal) as the owner and operator of a natural gas processing plant at Tioga, North Dakota, had residue gas for sale[6]. Signal produces no gas in North Dakota but obtains it by purchase or as a processing fee from

[6]Six years later Amerada purchased a fifty percent interest in the plant but Signal continues to operate it. (R. 23-4).

numerous North Dakota producers. (R. 192). Montana-Dakota Utilities Company (MDU) operates a pipeline from which it serves gas consuming areas within the State of North Dakota as well as other areas outside the State of North Dakota. (FPC Pet. 12-13).

On July 18, 1955, Signal and MDU entered into a "firm gas" contract by which Signal agreed to make deliveries of stated quantities to MDU *for resale to the communities served in North Dakota.* Several weeks earlier Amerada had entered into a similar contract with MDU. No application was filed with the F.P.C. to make sales under the "firm gas" contract because it provided for sales of gas for resale within the same state and hence not subject to federal jurisdiction under the Natural Gas Act.

On July 19, 1955, Signal and MDU entered into a contract for the sale of "dump gas" to be used by MDU in consuming areas outside the State of North Dakota. Amerada had made a similar "dump gas" contract. An application was filed with the F.P.C. for a certificate to make interstate sales under the "dump gas" contract. At the hearing on that application held in 1955-6 the North Dakota Public Service Commission intervened and contended that the F.P.C. had jurisdiction even over the sales for resale in the same state because of the physical commingling of the intrastate gas in a pipeline with interstate gas. The Commission through its Staff recognized that gas is a fungible commodity and accordingly took the sound position that mere commingling, where there are sepa-

rate transactions and quantitative product separation, does not destroy the nonjurisdictional status of Signal's North Dakota gas sold for resale in North Dakota.[7]

The fact that this intrastate sale was not entrusted by the Congress to FPC regulation was so clear that the Examiner saw no room for intelligent difference of opinion on that point. He ruled that the Commission "clearly" had no jurisdiction over the sales made to supply North Dakota markets because "it has no authority to regulate *intrastate* sales." Observing that commingling during transportation "does *not* convert the * * * contracts into interstate contracts," the Examiner wrote:

> "The conclusion that they are accordingly intrastate sales is *so obvious as to require no extended discussion.*"[8]

A unanimous Commission adopted that reasoning and affirmed that result.[9]

From that Commission order North Dakota appealed to the United States Court of Appeals for the Eighth Circuit. The same counsel who appears in the case at bar as Solicitor for the Commission also appeared in 1957 before the Eighth Circuit in a similar capacity. Referring to decisions of this and other courts he solemnly counseled — but completely contrary to the position he now takes here — as follows:

"For those decisions make it *plain* that the

[7]This factual history is recounted in *State of North Dakota v. F.P.C.*, 247 F. 2d 173 (8th Cir. 1957).
[8]*In Re Montana-Dakota Utilities Company*, 16 FPC 401, 408-9 (1956).
[9]Id. at 415.

> indistinguishable commingling of jurisdictional and nonjurisdictional gas in delivery is *not* sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction."[10]

The Eighth Circuit, likewise respecting the established legal principles governing the handling of fungible goods, reached the same conclusion:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity *because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered* before any portion of the gas stream has left the State of North Dakota."[11]

Three years later Signal entered into a "firm gas" contract with MDU to supply markets outside North Dakota, a sale admittedly subject to the jurisdiction of the F.P.C. (R. 39). At about the same time it revised its contractual terms for sales of gas to serve North Dakota communities by making changes which essentially increased the volumes to be delivered in order to permit service to other North Dakota communities not previously served. (R. 15, 154). By the time Signal applied for a certificate to make deliveries under the new interstate contract, which was dated January 16, 1961, there had been new appointees to the Federal Power Commission and three of them, two of whom still remain on the Commission, had flatly repudiated the decision of the Eighth Circuit, refused to follow

[10]Brief of the Federal Power Commission, p. 10, *State of North Dakota v. FPC*, 247 F. 2d 173 (8th Cir. 1957).

[11]*State of North Dakota v. FPC*, 247 F. 2d 173, 177 (8th Cir. 1957).

it, and asserted jurisdiction over sales of gas even for resale in the same state whenever it is transported in a pipeline that also carries interstate gas. This "attempt to aggrandize the scope of its jurisdiction"[12] first appeared in the *Lo-Vaca* case. After disparaging the wisdom of the Eighth Circuit with the comment that

> "The *North Dakota* case presents the most serious problem of distinction. Whether or not that case was rightly decided is an open question,"[13]

the new Commissioners proceeded to brush aside the judicial authority of that court with the back of their hand:

> "To the extent that *North Dakota* may be inconsistent with the action **WE** take here, we believe it was erroneously decided."[14]

This expressed Commission attitude was more than faintly reminiscent of the description given by the late James M. Landis to then President Elect John F. Kennedy of the Commission's ". . . attitude, *substantially contemptuous*, of refusing in substance to obey the mandates of the Supreme Court of the United States and other federal courts."[15]

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[12] *Federal Power Commission v. Transcontinental Gas Corporation*, 365 U.S. 1, 24 (1961).

[13] *In Re Lo-Vaca Gathering Company*, 26 FPC 606, 614 (1961)

[14] Id. at 614-15.

[15] "Report on Regulatory Agencies to the President Elect", submitted by James M. Landis and printed by the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate, p. 55 (1960).

At the hearing upon Signal's application to certificate its 1961 interstate contract, the Commission *on its own initiative* asserted jurisdiction over the sales by Signal to MDU to serve North Dakota communities.[10] It was not in the least dissuaded by an outstanding final judgment of the United States Court of Appeals holding these same sales to be nonjurisdictional in a case in which these same parties were before that court. In a 3 to 2 opinion the Commission simply "overruled" the Eighth Circuit and disregarding its mandate to the contrary, proceeded to hold Signal's sales of North Dakota gas to serve North Dakota communities to be subject to federal regulation. The parties were all parties to the former case; the sellers were the same; the buyer was the same; the statutory limits on the Commission's jurisdiction were the same; the issue was the same; only the members constituting the Commission had changed.

Signal's appeal followed back to the Eighth Circuit which, in a *carefully reasoned opinion*, unanimously reversed the Commission on two independent grounds:

> *First*, that the judicial decision of the jurisdictional issue in an earlier case between the same parties "bars resurrection of the issue again" (FPC Pet. 27), and
>
> *Second*, that gas sold for resale in the state of its production is not a sale in interstate commerce

[10] In contrast, the North Dakota Commission, although participating in the hearing below, respected the Eighth Circuit's prior adjudication and did not urge, as it had before the *court* ruled in 1957, that there was federal regulatory authority over this intrastate sale. In fact no one was urging the F.P.C. to assert jurisdiction here. They did it entirely on their own.

> even though the transportation facilities utilized to move it from field to market are also made available for the transportation of interstate gas fungibly commingled with the intrastate volumes.

Contrary to the assurance given this Court (FPC Pet. 8) that the Eighth Circuit in so ruling "relied largely upon the reasoning of the Fifth Circuit in the *Lo-Vaca* case, *supra*, now pending on writs of certiorari, Nos. 46, 47, and 57, this Term," it is perfectly apparent from a reading of the Eighth Circuit's opinion that it relied upon its own prior decision and upon its own good judgment respecting the applicable law. In fact, before the Fifth Circuit ever heard of the *Lo-Vaca* case, the Eighth Circuit had unequivocally concluded with respect to the same sales involved in the case at bar:

> "The transactions in question covered gas produced, transported, sold and consumed entirely within the State of North Dakota. They do not constitute interstate commerce in any sense of the word."[17]

It is the second point in this Eighth Circuit decision which the Commission now seeks to have reviewed on certiorari without bringing before this Court the other and independent ground on which the lower court's decision rests.[18]

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[17] *State of North Dakota v. Federal Power Commission*, 247 F. 2d 173, 178 (8th Cir. 1957).

[18] The Commission contents itself with asserting in a footnote on page 10 of its petition that it "reserves the right to argue that the court below erred in holding that the Commission was collaterally estopped" by the prior adjudication. Surely that type of casual reference is not compliance with Rule 23 of this Court which requires all questions

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because it is nothing more than an untimely petition to review the final 1957 decision of the Eighth Circuit. The appointment of new personalities to the Commission does not alter that conclusion, and the fact that the Commission has completely reversed the position it took in the former case is *a fortiori* support for it. Neither Signal nor any other litigant should be subjected to the abuse of repeated reopening and retrial of decided issues because the individuals exercising administrative authority decide they would like to expand their jurisdictional spheres. There must be an end to the burdens of litigation.

The Court of Appeals Correctly Refused to Permit Relitigation of Its Final Judicial Determination

This Court has clearly recognized that a regulated party has the same right as the administrative agency to rely on the conclusiveness of judicial determinations:

> "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. *The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court* to the same extent that

necessary to a reversal to be presented in the petition and specifically directs that only such questions as are set forth in the petition "will be considered by the Court." Such attempts to raise an issue by mere reference to it in the argument have consistently been held insufficient. *Herbring v. Lee*, 280 U.S. 111 (1929); *Mazer v. Stein*, 347 U.S. 201, 206 n. 5 (1954).

> other litigants may rely on judgments for or against them . . . . *there must be an end to disputes* which arise between administrative bodies and those over whom they have jurisdiction."[19]

The Court of Appeals for the Eighth Circuit in 1957 decided, for the benefit of both the Commission and Signal, that Signal's sales of gas in North Dakota to MDU to serve North Dakota markets were not subject to federal regulation even though commingled by MDU in a pipeline containing gas moving in interstate commerce. Since that decision became final, neither party has any right to impose upon the other the burden of retrying the issue previously determined. Only the judiciary can protect a party from the harassment of such repetitive litigation. This Court has well said:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, *a collateral attack upon the decision* **as to jurisdiction** *there rendered merely retries the issue* previously determined."[20]

The Commission had its "day in court" with full opportunity to present its "view of the law" and that ended the matter. The fact that the jurisdictional issue decided by the Eighth Circuit for these parties

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[19] *International Union v. Eagle-Picher Mining and Smelting Company*, 325 U.S. 335, 340, 341 (1945).

[20] *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

in 1957 is the *same issue* which the Commission now seeks to relitigate cannot be seriously questioned. After hearing the argument in far greater detail than we are constrained to impose upon this Court in this response, the Eighth Circuit said, "In our former opinion we fully adjudicated and decided the *same issue* * * *." (FPC Pet. 27).[21]

Of course the finality of judicial decisions involving administrative agencies does not crumble with each change of the administrators:

> "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in *relitigation of the same issue between that party and another officer of the government.* See Tait v. Western Maryland R. Co., 289 US 620, 77 L ed 1405, 53 S Ct 706. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy."[22]

Nor does the fact that the issue sought to be relitigated is one of jurisdiction make its determination a transitory exercise for, as this Court has said, "* * * the principles of res judicata apply to questions of jurisdiction as well as to other matters—whether it

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[21]The Commission's superficial effort to claim that the issue was different from that decided in the earlier case is so completely answered by the opinion of the court below (FPC Pet. 21-25), that it would be an imposition on this Court to add further argument on the point.

[22]*Sunshine Anthracite Coal Company v. Adkins*, 310 U.S. 381, 402 (1940).

be jurisdiction of the subject matter or of the parties."[23]

Surely the Commission cannot avoid the binding effect of the 1957 Eighth Circuit decree by the expediency of its own inconsistency. The estoppel of the prior determination is not lessened simply because the Commission, *as the court below noted*, "has now retreated from previous agreement with the rationale of *Peoples Natural Gas Co.* when it argued in *State of North Dakota v. Federal Power Commission* that intrastate gas does *not* lose its nonjurisdictional status when commingled with interstate gas in a common pipeline." (FPC Pet. 21). Precisely the converse is true:

> "Normally, if such an issue, *albeit, concerning the jurisdiction of the tribunal itself*, has once been decided between the parties by a competent court, another court will not permit the matter to be relitigated between the same parties in another case. Stoll v. Gottlieb, 1938, 305 U.S. 165, 59 S.Ct 134, 83 L.Ed. 104; Sherrer v. Sherrer, 1948, 334 U.S. 343, 68 S.Ct. 1087, 1097, 92 L.Ed. 1429. This rule of repose is *doubly justified* in the rare case in which the party who won on an issue in the first case attempts to obtain a contrary ruling in the second litigation, as the railroads are trying to do here. . . . Res judicata should and does apply."[24]

Indeed it is doubtful that the Commission has the legal

[23] Id. at 403.

[24] *Seatrain Lines, Inc. v. Pennsylvania R. Co.*, 207 F. 2d 255, 259 (3rd Cir. 1953).

right to the flip-flop which it seeks to make:

> "It is a well-settled rule based upon the principle of estoppel, which is sometimes applied in determining the effect of a judgment, that a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits."[25]

As recently as 1958 this Court rebuked other efforts to relitigate an issue which had been determined by the Court of Appeals on review of an order *from the Federal Power Commission*, characterizing them as "impermissible collateral attacks upon, and de novo litigation between the same parties of issues determined by, the final judgment of the Court of Appeals."[26] In holding that the issue could not be tried a second time this Court said:

> "We think these recitals show that the very issue upon which respondents stand here was raised and litigated in the Court of Appeals and decided by its judgment.[27]

The fact that the volume of gas to be delivered by Signal to serve North Dakota markets was increased in 1961 renders no significant change in the issue so as to permit a United States agency the luxury of relitigating it:

> "The United States may not relitigate the same issue in successive libel proceedings involving *different quantities* of the same product (George H.

[25] 2 Freeman on Judgments, §631 (1925).
[26] *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958).
[27] Id. at 339.

> Lee Co. v. United States, 9 Cir., 41 F.2d 460), nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same."[28]

The fact that Signal's sales of North Dakota gas to serve North Dakota communities are not made in violation of federal regulations is an issue which was laid at rest in the 1957 litigation:

> "The question whether the respondent had sold the commodities in violation of the federal regulation, having been determined in the first suit, is therefore laid at rest by a principle which seeks to bring litigation to an end and promote certainty in legal relations."[29]

The Commission Improperly Seeks to Aggrandize the Scope of Its Jurisdiction

The reason for the Commission's about-face is quite apparent. The court below, recognizing it as a rather transparent effort of an administrative agency to enlarge its own jurisdiction, aptly responded:

> "Congress, not the contracts, has exempted the Commission's jurisdiction in this instance. Neither the Commission nor this Court has the authority to expand the Commission's jurisdiction." (FPC Pet. 25).

In a very penetrating Law Review article by Professor John Paul Sullivan of the George Washington University Law School, the Commission's unashamed re-

[28] *George H. Lee Co. v. Federal Trade Commission*, 113 F. 2d 583, 586 (8th Cir. 1940).

[29] *United States v. Munsingwear, Inc.*, 340 U.S. 36, 38 (1950).

pudiation of the Court of Appeals decision is characterized as "a high point of administrative self-assurance." That author observes that if the enlargement of jurisdiction by reason of commingled transportation stands, then "state jurisdiction has been cut away to virtually nothing and absolutely nothing will soon be left."[30] With reference to the decision of the Commission in the *Lo-Vaca* case, since reversed by the Fifth Circuit and now before this Court, Professor Sullivan goes on to say:

> "That this decision [of the Commission, not of the Fifth Circuit] is simply bad law is perhaps clear, but the matter goes far beyond an abstract conclusion of law. Its error is that it makes the distinction between 'affecting interstate commerce' and 'in interstate commerce' meaningless."[31]

If it were not obvious at the time, that the Commission's repudiation of the Eighth Circuit's judgment was nothing more than an effort to arrogate unto itself more and more power, subsequent developments have certainly made it obvious. In 1961 this Court had before it a direct sale from a producer to an end user and a transportation contract by an interstate pipeline company. Although obviously there was a commingling of the gas during transportation with gas sold for resale in interstate commerce, this Court properly reasoned that the arrangement "does *not*

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[30]Sullivan, "Federal Power Commission Jurisdiction Over Commingled Sales of Natural Gas: A Problem in Judicial and Administrative Legislation", 30 George Washington Law Review 638, 676 (1962).

[31]Id. at 678.

entail a sale for resale in interstate commerce."[32] At the time the Commission wrote its decision in *Lo-Vaca* it was not yet ready to assert jurisdiction over all transactions involving commingling and thus to repudiate *this* Court's own 1961 decision. To avoid that conclusion, which would inevitably follow from the "commingling logic" being used by the Commission to extend its jurisdiction, the *Lo-Vaca* opinion contained this self-imposed limitation:

> "In reaching this conclusion, we are cognizant of the fact that there exists in the natural gas industry arrangements whereby companies transport natural gas for other companies, commingling it with gas from various sources . . . It is not our intention by this opinion to disturb such transportation arrangements."[33]

But even that limitation is now falling under the onslaught of the Commission's jurisdictional march. Thus in its brief currently on file in this Court in *Lo-Vaca* (No. 57, this Term) at page 22 there is a footnote asserting that the producer's sale in the field before this very Court in *FPC v. Transcontinental Gas Corporation* and clearly treated by this Court as non-jurisdictional was *really* "subject to the Commission's jurisdiction" after all.

The climax of this grasping for administrative power is found in the very recent action of the Commission in a case now pending before it and to which

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[32] *Federal Power Commission v. Transcontinental Gas Corporation*, 365 U.S. 1, 4 (1961).

[33] *In Re Lo-Vaca Gathering Company*, 26 FPC 606, 611 (1961).

we refer since it is a public record.[34] In that case Texaco made a transportation contract with Transcontinental for the purpose of taking Texaco's own gas from fields in the Southwest to New Jersey for use in Texaco's own refinery.[35] Of course no one even contended that, by entering into a transportation contract to permit its own use of its own gas, Texaco had made a *sale* to a third party in interstate commerce. But subsequent to the Examiner's decision on the application to certificate the transportation arrangement, the Commission in an order issued August 25, 1964, intimated that it would try to assert jurisdiction over Texaco's gas transported for its own use by inviting argument on the following issue raised by it — admittedly *sua sponte:*

> "Whether the arrangement between Texaco and Transco involves a sale of gas by Texaco to Transco for resale by the latter so that the *producer* should be required to secure a certificate."[36]

Incredible though it may seem, the Commission, through its Staff, has responded to that invitation with a brief filed in that Docket on October 12, 1964, wherein, starting with the insupportable "commingling logic" by which it had repudiated the Eighth Circuit's judgment, it *now* asserts jurisdiction over Texaco's

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[34] *In Re Transcontinental Gas Pipe Line Corporation*, FPC Docket No. CP63-222.

[35] The Examiner's opinion (slip ed. issued June 5, 1964, p. 48) succinctly describes the factual situation as "the transportation of natural gas by a producer through the facilities of an interstate pipeline for consumption in the producer's own refinery • • •".

[36] Order Granting Motion for Oral Argument and Setting Date for Argument, issued August 25, 1964, in Docket No. CP63-222.

right to use its own produced gas:

> "The first *sale* occurs when Texaco delivers the gas to Transco in Texas and Louisiana and the second *sale* occurs when Transco redelivers [sic] approximately equivalent volumes of gas to Texaco in New Jersey. The first sale is subject to the jurisdiction of this Commission because Transco will subsequently resell this gas both to Texaco and to Transco's other interstate customers."[37]

This development illustrates, we believe, that the Commission's appetite for more and more jurisdiction is virtually insatiable. By the "commingling logic" it steamrollered over the final judgment of a United States Court of Appeals to emasculate the statutory requisite for a sale "in interstate commerce." Its Staff at least has now taken the final step, and by the fiction of pretending that a producer who contracts with a pipeline to transport his gas has sold the gas to the pipeline and bought it back at the other end, has emasculated from the statute even the requirement for a "sale."

Though we disagree with its soundness, we do not question the good faith of the Commission in believing that it *should* have jurisdiction over all sales of gas, regardless of whether or not they are made to serve markets in different states. But, as this Court recently took occasion to observe with respect to another administrative agency seeking to "aggrandize the scope of

[37]Brief of Commission Staff on jurisdiction issue, October 12, 1964, pp. 3-4, *Transcontinental Gas Pipe Line Corporation*, FPC Docket No. CP63-222.

its jurisdiction":[38]

> ". . . the determinative question is not what the Board thinks it *should* do but what Congress has said it *can* do."[39]

Even the dissenting Commissioners in *Lo-Vaca* seemed preoccupied with the *legislative* inquiry as to what types of sales *should* be federally regulated but, as explained in Professor Sullivan's scholarly analysis, such an inquiry really misses the point:

> "Commissioner O'Connor dissented in part in an opinion which was somewhat disappointing in that it attacked only the wisdom of the Commission's establishing 'such a broad policy.' By implication there was an admission that the Commission had the power to do what it did. Commissioner O'Connor concluded that:
>
> > It appears to me that the advantages to interstate pipeline companies of the flexibility in disposing of surplus supplies of gas in intrastate commerce, as well as the potential usefulness of these lines in providing intrastate transportation revenues, far outweigh the possibilities of additional costs to interstate consumers. [26 FPC at 617].
>
> What is most annoying about this statement is that it assumes a power where none exists. Again the wrong question is asked and so the answer, whatever it might be, is beside the point."[40]

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[38]*FPC v. Transcontinental Gas Corporation*, 365 U.S. 1, 24 (1961).

[39]*Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961).

[40]Sullivan, Federal Power Commission Jurisdiction Over Commingled Sales of Natural Gas: A Problem in Judicial and Administrative Legislation, 30 George Washington Law Review 638, 677 (1962).

THE RELATIONSHIP OF THIS CASE TO THE PENDING LO-VACA CASE[41]

The Commission asserts that this case "presents the same question" as *Lo-Vaca* and accordingly requests that its petition herein should await and abide the Court's decision in *Lo-Vaca*. (FPC Pet. 8-11). Perhaps the story briefly outlined above makes it self-evident why the Commission seeks to place this Court in the unsatisfactory position of passing on the "stronger case", with nothing before it but the situation in the "weaker case."[42] The strategy is ingenious but hardly fair to the Court. It is an obvious effort to reach their goal by "hiding the ball." The Commission confusingly assures this Court on the one hand that the Eighth Circuit merely relied on the reasoning of the Fifth Circuit (FPC Pet. 8) and on the other hand with equal positiveness, that the Fifth Circuit merely relied on the reasoning of the Eighth Circuit.[43]

Either the two cases are different or, in fairness to the Court, the facts and legal developments in this case should be before the Court prior to the time it decides *Lo-Vaca*. Two very real differences either exist or appear to exist. In the first place *Lo-Vaca* does not involve the soundness of a United States Court of Appeals's insistence that its final judgment be re-

[41] *FPC v. Lo-Vaca Gathering Company et al*, Nos. 46, 47, and 57, this Term.

[42] No implication is intended that *Lo-Vaca* is weak but realistically the exposure of the Commission's jurisdiction-enlargement purpose is stronger with this case also in view. Part of the relevant facts are hidden from the Court if only *Lo-Vaca* is before it.

[43] Brief for Federal Power Commission p. 27, *FPC v. Lo-Vaca Gathering Company et al*, No. 47, this Term.

spected by an administrative agency. In the second place the issue in *Lo-Vaca* is either different from the situation in this case or it is misstated. The Commission tells this Court that the question in *Lo-Vaca* is "whether the parties to a sale of gas may defeat the Commission's jurisdiction by a contractual stipulation *contrary to the physical facts of gas flow*, that all of the gas will be consumed within the State where the sale took place." (FPC Pet. 8). If that is an accurate statement of the issue in *Lo-Vaca*, then the issue is different here because in the case at bar the gas sold under the North Dakota contracts is delivered for resale in North Dakota and the contracts are not "contrary to the physical facts of gas flow." Indeed the measurement and physical separation of the quantities of gas sold by Signal for resale in North Dakota are scientifically accurate and are completely consistent with the contractual provisions. There is not even any dispute on this point in the record evidence. (R. 3-4 and 158).

CONCLUSION

For the foregoing reasons we request from this Court the following action:

1. That the petition herein be denied on the basis that the issue sought to be raised by the Commission has been finally adjudicated for these same parties in a judicial decree that was properly respected by the court below.

2. That, if the petition herein should be granted, the decision in *Lo-Vaca* be deferred until the Court has the benefit of briefs and argument in this case.

3. That, if certiorari is to be granted herein and *Lo-Vaca* must be decided before our case is heard, that the opinion in *Lo-Vaca*, if this Court should decide to reverse the Fifth Circuit, be carefully confined to those situations involving contracts at odds with the physical handling of the gas and not preclude consideration on the merits of a sale of gas produced, sold, transported, accurately measured and consumed within a single state but fungibly commingled, during a part of its journey, in a common pipeline with gas destined for resale in interstate commerce.

Respectfully submitted,

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No. 585

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

FEDERAL POWER COMMISSION,
Petitioner,

vs.

AMERADA PETROLEUM CORPORATION,

and

SIGNAL OIL AND GAS COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR AMERADA PETROLEUM CORPORATION IN OPPOSITION

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No. 585

IN THE

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OCTOBER TERM, 1964

FEDERAL POWER COMMISSION,
Petitioner,

vs.

AMERADA PETROLEUM CORPORATION,

and

SIGNAL OIL AND GAS COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR AMERADA PETROLEUM CORPORATION IN OPPOSITION

Comes now Amerada Petroleum Corporation (Amerada), Respondent herein and opposes the petition for writ of certiorari filed by the Federal Power Commission (Commission), No. 585.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (Pet. App. A, 11-27) is reported at 334 F.2d 404. The opinion and orders of the Federal Power Commission (R. 242-265, 284-285) are reported at 30 FPC 200 and 677.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at pages 1 and 2.

QUESTIONS

1. Is a sale of natural gas which is produced, transported, sold and consumed wholly within the State of North Dakota transformed from an intrastate sale into an interstate sale merely because the intrastate volumes sold, are, before being withdrawn by the North Dakota towns along the way, commingled in a 12 inch pipeline with gas which will be transported into Montana for resale?

2. In the face of a final, unappealed judgment by the Court below involving the same issue, the same material facts, and the same parties (including the Commission), where it was adjudged and decreed that a sale of gas, produced in North Dakota, for consumption in certain North Dakota towns, though commingled in route before delivery, was an intrastate sale—Is the Commission precluded from relitigating anew the same question involving the same material facts and the same parties?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U.S.C. Sec. 717-717w) are set forth in the Petition at pages 2 and 3.

STATEMENT

This case involves the jurisdiction of the Federal Power Commission over the sale of a commingled stream of intrastate and interstate gas; it also involves outright Commission repudiation of a judicial decision solemnly rendered by the Court below 7 years ago, and the Commission's flat refusal to be bound thereafter by the judgment there rendered, though it was the winning party, because in the Chairman's words, that case "was erroneously decided."[1] Because the prior litigation involved the *same* issue, the *same* material facts, and the *same* parties, though differently aligned, a brief resume of the earlier facts and circumstances will be an aid in understanding the case at bar.[2]

Amerada's Former Sales to MDU—On June 24, 1955, Amerada entered into a "firm gas" contract with Montana-Dakota Utilities Corporation (MDU) providing for the sale of certain gas from the tailgate of Signal Oil and Gas Company's (Signal) plant at Tioga, North Dakota. A like

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1. *Lo-Vaca Gathering Company*, 26 FPC 606, 615 (1961). The Commission below again embraced this language when quoting the Examiner (R. 251) and also repudiated the 1957 decision by the Court below because that "decision failed to take appropriate account" of certain facts. (R. 254).

2. All emphasis contained in this brief, whether in the text or in quoted materials, is supplied by the writers unless otherwise indicated.

contract was entered into between Signal and MDU on July 18, 1955, covering Signal's share of the gas. These contracts were for a twenty year term at a beginning price of 16¢ per Mcf delivered at the tailgate of the Tioga plant. No federal permit was requested for these contracts, as the "firm gas" was to supply the Tioga-Minot, North Dakota, line, and the North Dakota communities of Ray, Wheelock, Epping and Springbrook, and they were therefore regarded as *intrastate*.

On June 25, 1955, Amerada and MDU entered into a seven year contract whereby Amerada sold its "dump gas" to MDU at 9¢ per Mcf delivered at the tailgate of the Tioga plant. On July 19, 1955, Signal and MDU entered into a similar contract for "dump gas" at a similar price. The "dump gas" sold under both contracts was admittedly for resale in interstate commerce, and accordingly such contracts were within the jurisdiction of the Federal Power Commission.[3]

It was contended *then* by the Public Service Commission of the State of North Dakota, as *now* by the Commission, that the commingling of the *intrastate* gas sold under the "firm gas" contracts with the *interstate* gas sold under the "dump gas" contracts resulted in giving the Federal Power Commission jurisdiction over the entire commingled stream. The Court of Appeals for the Eighth Circuit held to the contrary.[4]

Amerada's Present Sales to MDU—Subsequent to the execution in 1955 of the "dump" and "firm" gas contracts,

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3. The foregoing statement of facts regarding the four 1955 contracts is taken from the opinion in *State of North Dakota* v. *Federal Power Commission*, 247 F.2d 173, 174 (8th Cir. 1957).

4. *State of North Dakota* v. *Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957).

Amerada made additional discoveries of oil well gas (R. 23) and gas well gas (R. 6) and enlarged the productive area. Because the "firm gas" contract only covered the gas required to supply the communities on the Williston-Minot line (R. 16) and the "dump gas" contract did not dedicate any reserves to MDU on a permanent basis (R. 21) MDU entered into two new contracts with Amerada for the purchase of additional gas to meet the demands of its expanding markets.

The first of these, the North Dakota Contract dated December 21, 1960, provides for the sale of gas produced from certain North Dakota fields with delivery to be made, as before, at the tailgate of the Tioga plant; it has a twenty year term and a beginning price of 17¢ per Mcf (R. 126-151). By its terms, Amerada will sell to MDU a part of the gas which MDU will need to supply the North Dakota communities located along and served by the MDU pipeline system, including the communities which will be served by MDU's new 106-mile line connecting Minot and Bismarck, North Dakota (R. 129). The map inserted in the Court's opinion below (Pet. App. A 15) will aid the Court in visualizing the MDU pipeline system. The North Dakota Contract supersedes the earlier intrastate "firm gas" contract, which only provided for the purchase and sale of limited volumes of gas in a limited market area (R. 16).

The North Dakota Contract provides that all gas purchased thereunder by MDU "shall be transported, used and consumed entirely *within* the State of North Dakota" (R. 130), and "shall not, at any time, cover the sale or delivery by Amerada of any gas which is *transported beyond the boundaries* of the State of North Dakota" (R. 132). These and other provisions (R. 130) make it clear that the parties considered this transaction as one over which the Federal Power Commission had no jurisdiction. Amerada did not,

therefore, request the Federal Power Commission to issue it a certificate of public convenience and necessity.

On January 10, 1961, about three weeks later, Amerada and MDU entered into a separate and distinct Interstate Contract providing for the sale to MDU of additional volumes of gas, also, as before, to be delivered at the tailgate of the Tioga plant; it had a term of twenty years and a beginning price of 17¢ per Mcf (R. 97-123). It obligated Amerada to complete a sufficient number of gas wells, not exceeding four in number, to make available to MDU 25,000 Mcf per day of gas well gas (R. 101-102). This contract envisioned Commission jurisdiction; it required Amerada to secure a "certificate of public convenience and necessity and any other necessary approvals from the Federal Power Commission for the sale of gas under this agreement" (R. 101). On August 28, 1962, the Commission granted to Amerada a certificate of public convenience and necessity with respect to this sale (R. 214).

On January 16, 1961, Signal and MDU entered into a North Dakota Contract, and on January 18, 1961, they entered into an Interstate Contract, both of which contained terms and provisions which in large measure are similar to those contained in the Amerada-MDU contracts (R. 24).

Both Amerada and Signal agreed in the certificate proceeding not to apply to the Commission for abandonment of their "dump gas" contracts because if circumstances ever arose in which "flare gas" was available, it could be sold under the "dump gas" contracts (R. 26-27).

Additional Supplies of Gas to MDU—In addition to the four Amerada and Signal contracts just described, two other companies also contracted to supply gas to MDU into that segment of its pipeline (only about 85 miles in length) which runs from Tioga, North Dakota, to Sidney, Montana,

which is just across North Dakota's western border (R. 29). Thus, Hunt-Herbert and The TXL Oil Corporation (now Texaco) sell gas to MDU from their respective gasoline plants located northeast of Tioga, North Dakota (R. 197). The Hunt-Herbert contract was entered into March 27, 1961 (more than three months *subsequent* to Amerada's North Dakota contract) and Hunt-Herbert did not file its application for a certificate until May 11, 1961; the TXL contract was entered into on March 9, 1961 (also approximately three months *after* the date of Amerada's North Dakota contract) and TXL did not file its application for a certificate until May 23, 1961.

MDU entered into but *one* contract with Hunt-Herbert for the sale of its gas and likewise entered into but a *single* contract with TXL. Both of these contracts admittedly constitute sales of gas for resale in interstate commerce. Both sellers applied for and were granted certificates of public convenience and necessity by the Commission (R. 213). Approximately 5,000 Mcf of gas per day is delivered to MDU by Hunt-Herbert, and approximately 10,000 Mcf per day is delivered to MDU by TXL (R. 29). None of the gas purchased from Hunt-Herbert and TXL will be delivered or transported through the eastern segment of MDU's pipeline which runs from Tioga to Minot; only Amerada and Signal gas will travel eastward to Minot (R. 7, 12, 13). All of the Hunt-Herbert and TXL gas will flow westward toward the Montana border (R. 13).

On a peak winter day, MDU will purchase 70,000 Mcf of North Dakota produced gas; 55,000 Mcf will be purchased from Amerada and Signal, 10,000 Mcf from TXL, and 5,000 Mcf from Hunt-Herbert (R. 29). Of the 55,000 Mcf supplied under the Amerada and Signal contracts, 50,000 Mcf will flow to the *east* and will be consumed in the North Dakota towns which lie along MDU's line from Tioga to

Minot, to Bismarck, etc. (R. 29). Amerada and Signal will supply 5,000 Mcf of gas which will flow to the *west*, which will be commingled with the 15,000 Mcf of gas supplied by Hunt-Herbert and TXL. Of this amount, 10,200 Mcf will be consumed within the State of North Dakota by the consumers in the towns lying along the western segment of the line (R. 233).

Determination of Intrastate Volumes by Separate Measurement. The *uncontroverted* testimony of Mr. Lawrence H. Armstrong, Gas Engineer for MDU, concerning the separate measurement and metering of intrastate gas was in part as follows:

> "Two separate metering stations *will continue* to measure the quantity of gas which flows from the Tioga plant. One station will measure the quantity of gas which flows westward toward Williston, North Dakota, and Fairview, Montana; the other station will measure the quantity of gas which flows eastward toward Minot, North Dakota, . . . Metering stations will also be installed to separately measure the quantity of gas delivered by Lyda Hunt-Herbert Trusts et al. and the TXL Corporation, from the North Tioga and Lignite plants into Montana-Dakota's system. The *proportion* of the gas stream flowing westward and eastward from Tioga which is supplied by Amerada and Signal *will therefore be known at all times*. The *amount* of North Dakota gas which is *consumed in North Dakota, before leaving the state*, will be *separated* from the gas stream in these two branches of the main line and will be *measured at each town gate* before *any portion of either stream leaves the state of North Dakota*.
>
> * *
>
> ". . . *we will know the quantity of gas* which is *produced* in North Dakota and *withdrawn* from each branch of the main line and which is *consumed* in North Dakota *before it leaves the state*." (R. 3-4).

Decisions Below—In a 3 to 2 opinion the Commission, relying on its own decision in *Lo-Vaca Gathering Company*, 26 FPC 606 (subsequently set aside 323 F.2d 190 (5th Cir.)), certiorari granted 377 U.S. 951, held—because gas sold in *interstate* commerce by Hunt-Herbert and TXL and gas sold in *intrastate* commerce by Amerada and Signal was commingled in the 85-mile segment of MDU's pipeline running west from Tioga to the Montana border—that the sale, of *all* volumes under Amerada's North Dakota contract (including that considerable volume flowing to the east) was converted into a sale for resale subject to the jurisdiction of the Commission. The Commission distinguished *North Dakota* v. *Federal Power Commission*, 247 F.2d 173 (8th Cir.), on the grounds that gas from additional sources (Hunt-Herbert and TXL) is now being commingled with the Amerada and Signal gas (R. 249-250). But more significantly, the Commission *refused* to follow and *refused* to be bound by that decision; instead it embraced its earlier depiction of that case saying that it "was erroneously decided" (R. 251).

The Court below, in a *unanimous* opinion, relying primarily on its own earlier opinion in *North Dakota*, and on this Court's opinion in *Peoples Natural Gas Company* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550 (1926), which it found to be in point "four square" *set aside* the Commission's opinion[5] on two distinct grounds, to-wit:

> 1. "If the commingling of interstate and intrastate gas in the former case did not deprive the state

5. The Court also relied on *City of Hastings, Nebraska*, v. *Federal Power Commission*, 221 F.2d 31 (App. D.C. 1954) cert. denied 349 U.S. 920 (1955); *Lo-Vaca Gathering Company* v. *Federal Power Commission*, 323 F.2d 190 (5th Cir. 1963) cert. granted 377 U.S. 951 (1964).

of regulatory jurisdiction, then the mere induction of additional interstate gas from other sources would not have that effect now.

* * *

"Congress, not the contracts, has exempted the Commission's jurisdiction in this instance. Neither the Commission nor this court has the authority to expand the Commission's jurisdiction." (334 F.2d 404, 411).

2. "In our former opinion, we fully adjudicated and decided the same issue recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and that decision as between these parties bars resurrection of the issue again." (334 F.2d 404, 412).

ARGUMENT

I.

The Case at Bar Is Not Controlled by Lo-Vaca.

Proclaiming that the Court below "relied largely upon the reasoning of the 5th Circuit" in *Lo-Vaca* (Pet. 8), now pending on writs of certiorari Nos. 46, 47 and 57, this Term, the Commission devotes only one short paragraph and gives but a single reason for granting certiorari in the case at bar. That reason, says the Commission, is that this case "presents the same question" as *Lo-Vaca* (Pet. 8). It then urges this Honorable Court, for "the reasons set forth in [its] brief in *Lo-Vaca*" to reverse the Court below. The Commission is mistaken. We shall so demonstrate.

The Court Below Did Not "Rely Largely" on Lo-Vaca. The Court below, though citing *Lo-Vaca* as being

consistent with its earlier decision in *North Dakota*, did not place primary reliance upon *Lo-Vaca*. Only 7 years earlier in *North Dakota* it had decided the *same* issue involving the *same* parties, and in view of this decision, there was simply no need to place extreme emphasis on *Lo-Vaca* and it did not do so. Indeed, because in *North Dakota* the *Commission itself* successfully pressed upon the Court below many of the same authorities and the same arguments which we made below, the Court's memory may have been awakened and perhaps it could still hear the forceful and ringing oral argument made by Counsel for the Commission in 1957, when he said:

> "You have a company operating under *two* separate contracts, . . . and even though the gas *is* taken from *interstate transportation facilities*, I don't think that nullifies the provisions of the *second contract* which provides for rates, for gas *produced* in North Dakota, *transported* in North Dakota and *consumed* in North Dakota."[6]

And that argument carried the day.

Moreover, in the opinion of the Court below, this Court's opinion in *Peoples* was "four square"[7] so it is simply wrong to say that the decision below rests upon *Lo-Vaca* and the Commission cannot, by so arguing, divert this Court's attention from the real issues in the case at bar.

There Is No Regulatory Gap in the Case at Bar. In *Lo-Vaca* the sale over which the Commission asserted jurisdiction was a sale to El Paso of gas to be used as fuel in compressors, treating plants, boilers, camps, and

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6. Transcript of Oral Argument before the Eighth Circuit in *North Dakota*, pp. 28-29.

7. 334 F.2d 404, 408.

other facilities outside of the State of Texas (Pet. 5 Lo-Vaca). The gas sold by Houston, over which the Commission also asserted jurisdiction, was to be used solely as fuel in the operation of El Paso's plant and a plant of Phillips Petroleum Company, both of which were located within the State of Texas (Pet. 6 Lo-Vaca). It was strenuously urged by the Commission in its petition for certiorari that the decision in that case:

> ". . . would create a serious gap in the comprehensive regulation which Congress has established for protection of consumers. No State could be expected to regulate a sale by a producer to an interstate pipeline for ostensible use in the latter's own operations. The producing State (here, Texas), though perhaps having the power, would have little interest in regulating an item of pipeline cost which would be reflected chiefly in the rates paid by consumers in other states. And the consuming States that might have an interest (here, New Mexico, Arizona and California) would have no power to regulate sales of gas outside their own borders. By its decision, the court below thus creates a class of sales by independent producers which are free from any effective regulation, either State or federal." (Pet. 18-19 Lo-Vaca).

In contrast to the foregoing, the gas sold under Amerada's North Dakota Contract will *not* be used by MDU in its own operations as fuel for compressors, treating plants, boilers or camps or for any other purpose. It will *not* be transported outside the state. Rather, the consumers living in the towns located along the MDU pipeline will be the beneficiaries of this sale. MDU is the distributing company in these towns. As a public utility it is subject to the statutory rate regulation powers of the

North Dakota Public Service Commission.[8] In further contrast to the picture painted by the Commission in *Lo-Vaca*, the North Dakota Public Service Commission, as a matter of *actual practice*, zealously safeguards the interest of the gas consumer by regulating the rates charged by MDU.[9] Yet at the same time it recognized the importance of making this gas available to MDU customers and accordingly intervened in the proceedings below before the Commission "in support of" MDU's application (R. 2).

The Commission itself recognizes these to be vital distinctions because *at no stage in these proceedings* has it ever argued that there will be a "regulatory gap." It frankly concedes this when in its brief on the merits before this Honorable Court in *Lo-Vaca* (Case No. 57) it says:

> ". . . in the case of a sale to an interstate pipeline for resale within the same State (as in *North Dakota*), the absence of federal jurisdiction would not inevitably permit the transaction to go entirely unregulated, since the State in question would have a strong in-

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8. NDCC 49-02-03. Power of public service commission to establish rates.—The Commission shall supervise the rates of all public utilities. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce tariffs, rates, joint rates, and charges of all public utilities. Whenever the commission, after hearing, shall find any existing rates, tariffs, joint rates, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this title, the commission by order shall fix reasonable rates, joint rates, charges, or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.

9. *Public Service Commission of North Dakota* v. *Montana-Dakota Utilities Company*, 100 N.W.2d 140 (1959).

terest in regulating the sale for the protection of its own resident consumers.

* * *

"In sum, the practical considerations which add force to the legal argument for federal jurisdiction in the present case were very largely absent in *Hastings* and *North Dakota*." (Comm. Br. 33-34).

The Commission's parting shot in its petition for certiorari in *Lo-Vaca* was a quotation from this Court's opinion in *Federal Power Commission* v. *Transcontinental Gas Pipeline Corporation*, 365 U.S. 1, 28, which reads:

"Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation." (Pet. 20)

As we have shown, the situation referred to by this Honorable Court in that case plainly does not exist in the case at bar. Because there is no "regulatory gap" the decision below does not impair the Commission's administration of the Natural Gas Act and yet the consumer is fully protected by state regulation. Thus, the case at bar, though important to the litigants involved, is not a matter of national public interest warranting review by this Court.

Gas Sold under the North Dakota Contract Will Not Flow Out of the State. In its petition for certiorari in *Lo-Vaca*, the Commission told this Honorable Court:

"The Commission asserted jurisdiction here not, as the court below suggests . . . merely because the gas proposed to be supplied by Houston and Lo-Vaca would travel through the same pipe line with gas destined for resale in interstate commerce, but be-

cause a large but indeterminate part of the Houston and Lo-Vaca gas would itself be resold in interstate commerce, notwithstanding the 'restricted use' provisions in the contracts." (Pet. 18)

Both the facts and the contracts make that indictment totally inappropriate in the case at bar. On a peak winter day Amerada and Signal will sell 55,000 Mcf of gas to MDU (R. 8). Of that volume 50,000 Mcf will flow to the *east*, will *not* be commingled with gas from any "other sources," and will be *wholly consumed* by the North Dakota towns located along MDU's line; not *one* Mcf will flow across the border into Montana (R. 7, 29). The Commission *concedes* this to be true (Pet. 6). After leaving the Tioga plant, 5,000 Mcf will travel *westward* and will be commingled with 15,000 Mcf supplied by Hunt-Herbert and TXL (R. 7, 8, 29). Of this volume, 10,200 Mcf will be consumed in North Dakota (R. 233).

Thus, *none* of the gas moving *east* will be commingled with the gas from Hunt-Herbert or TXL which are the "other sources" which the Commission contends distinguishes the case at bar from North Dakota (Pet. 17 Lo-Vaca) and *none* of the gas that flows east—let alone a "large but indeterminate part" will ever reach the Montana border; it will all be consumed within the state (R. 29). In the summer time only the volumes consumed in the towns along the way will be sold under the North Dakota Contract; all volumes flowing into Montana for storage will be sold under the Interstate Contract, which we admit is a sale for resale and is fully regulated by the Commission.

Certainly the 5,000 Mcf of gas moving *west* from Tioga is not a "large but indeterminate" amount. Further, Amerada's North Dakota Contract provides that all gas

purchased under it "shall be transported, used and consumed *entirely* within the State of North Dakota" and that it "shall not at any time cover the sale or delivery by Amerada of any gas which is transported beyond the boundaries of the State of North Dakota." (R. 130, 132).

Amerada's President did not admit, as the Commission says Houston's President did, that gas sold under its North Dakota contract would be used outside the state (Pet. 6 Lo-Vaca). And our contract provisions will be fully implemented by a comprehensive metering system which will measure the quantity of gas which flows from the Tioga plant so that the "amount of North Dakota gas which is consumed in North Dakota, before leaving the state, will be separated . . . and will be measured at each town gate before any portion . . . leaves the state." (R. 4). Thus, "we will know the quantity of gas which is *produced* in North Dakota and withdrawn from each branch of the main line and which is *consumed* in North Dakota *before it leaves the state*" (R. 4). The record is totally devoid of any evidence—and the Commission has cited no record reference in support of its contention—that any gas which crosses the Montana border will be *sold* under the North Dakota contract; indeed it cannot be. All gas which reaches Montana will be *sold* under Amerada's Interstate Contract.[10]

Amerada's North Dakota Contract Makes Gas Available to Additional Consumers. It is contended in the Commission's petition for certiorari in *Lo-Vaca* that:

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10. The Interstate Contract provides: "Notwithstanding anything else in this agreement contained, all gas produced in the Contract Area which is sold and delivered by Amerada to Buyer and which is transported outside of the State of North Dakota and resold shall be sold by Amerada and purchased by Buyer under this agreement" (R. 105).

> ". . . these two contracts could have no conceivable purpose or effect other than to avoid federal jurisdiction. Their removal from the Houston and Lo-Vaca contracts, and their insertion in the contracts of other suppliers, would not require the slightest change in El Paso's actual operations or in the routing of gas through its system." (Pet. 14-15).

Once again we find a significant reason urged upon this Court in *Lo-Vaca*, which is totally absent from the case at bar. Amerada's legitimate business purpose and MDU's need for the gas sold under Amerada's North Dakota contract, together with the gas sold under its Interstate Contract, has never been questioned. Amerada and Signal gas *only* flows through the new 106 mile line from Minot to Bismarck; not *one* molecule of Hunt-Herbert or TXL gas is commingled therein. Hundreds of North Dakota consumers, fully protected by state regulation, now have gas available to them which would not have been available if these transactions had not been worked out. And the importance of getting *new* gas available to *new* consumers in *unserved* areas has been highlighted recently by Chairman Swidler's call for a meeting on November 20 of the Natural Gas Advisory Council where the *first* item on the agenda is "Progress and problems of the industry in extending gas service to *unserved communities*."[11]

The Decision Below Was Correct. In the Court below the Commission sought to avoid the precedential and binding effect of *North Dakota*, decided in 1957 by the 8th Circuit, by urging its "one source" theory, which in a nutshell is: if *intrastate* gas is commingled in a pipeline having two or more sources of *interstate* gas, the *intrastate* gas becomes subject to the jurisdiction of the Federal Power Commission.

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11. Federal Power Commission Press Release No. 13507 dated October 20, 1964.

The Court below regarded this theory as totally fallacious. Indeed no court, to our knowledge, has ever enunciated such a theory. And for good reason, when one stops to consider the untenable legal consequences which would flow from such a theory. In the case at bar, the TXL and Hunt-Herbert contracts were executed approximately three months *after* the execution of the Amerada and Signal contracts. Suppose, however, that the TXL and Hunt-Herbert contracts had not been executed until some 18 months after Amerada and Signal executed their contracts; that in the meantime the Amerada and Signal applications for authority to sell their interstate gas had been approved by the Commission; that consistent with the contention which the Commission makes today (that Amerada and Signal constitute but "one source") the Commission had *not* asserted jurisdiction over the North Dakota contracts; and that deliveries had commenced under all four contracts. When TXL and Hunt-Herbert received Commission approval to sell gas 18 months later and started deliveries, it would then be commingled with the Amerada and Signal gas flowing to the west.

Presumably under the Commission's theory, instantaneously upon the happening of this event, Amerada's *intrastate* gas would become transformed into *interstate* gas. Thus, based upon totally *extraneous* circumstances, over which Amerada would have no control, the Commission could, and presumably would, because a new "source" had been added, assert jurisdiction. No wonder the Commission has not found even one opinion articulating its unfounded contention.

Professor Sullivan, in his recent comprehensive and analytical critique of the gas commingling cases, decided both before and after the passage of the Natural Gas Act

in 1938, states his conclusion concerning the state of American law as follows:

> "Where commingled intrastate and interstate volumes were involved, divisibility by calculation of volumes alone was sufficient to determine attaching of *federal* or *state* jurisdiction to a given quantity. Since the passage of the Act, decisions of the Commission with respect to jurisdiction over 'commingled' volumes and sales involving commingled volumes have vacillated. The *courts have continued to hold* that sales off an interstate transmission line *before* the line leaves the state of production and for consumption within the state of production are sales in intrastate commerce, even though the major portion of the quantity in the line is destined for interstate transmission."[12]

II.

The Decision Below Can Be Sustained on a Non-Federal Ground.

Although the Commission prevailed before the Eighth Circuit in *North Dakota*, a majority of the Commission has now turned its back on that decision, has refused to follow it or to be bound by it, has said that it "failed to take appropriate account" (R. 254) of certain facts and "was erroneously decided."[13]

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12. Sullivan, Federal Power Commission Jurisdiction over Commingled Sales of Natural Gas: A Problem in Judicial and Administrative Legislation, 30 Geo. Wash. L. Rev. 638 (1962).

13. *Lo-Vaca Gathering Company*, 26 FPC 606, 615 (1961). This is not the first time in recent years in which the Commission has refused to follow the law as announced by a Court of Appeals. When asked to follow a decision by the Court of Appeals for the 5th Circuit, it flatly refused saying: "Whatever the general effect of that decision, we believe that it was incorrectly decided. In any event, *we are not bound* by the decision of *one circuit*, and the Examiner should not consider himself bound." *Cities Service Gas Co.*, 26 FPC 665, 666 (1961).

The immediate reaction upon reading these opinions, by one schooled in the common law, is: By what authority does the Commission arrogate unto itself the power to "overrule" the Court of Appeals for the Eighth Circuit? One searches the Commission's opinion in vain for an answer. This was disturbing to Commissioner Woodward, who in his dissent, said:

> ". . . by what principles of constitutional law and statutory construction does the majority equate their position with the mandate of the Supreme Court of the United States and other Federal and State courts . . ."? (R. 262.)

We urged below, both before the Commission and the Court of Appeals, that because the issue was the *same*, the parties were the *same*, and the material facts were the *same*, the Commission was bound by the doctrine of *res judicata* or collateral estoppel. The Court below agreed, saying:

> "In our former opinion we fully adjudicated and decided the same issue recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and that decision as between these parties bars resurrection of the issue again." (334 F.2d 404, 412).

This is a wholly separate, distinct and non-federal ground upon which the decision below can be sustained. It does not involve a constitutional question. It simply rests on a fundamental tenet of the common law.

In *The Northern Pacific Railroad Company* v. *Ellis*, 144 U.S. 458 (1892), this Court dismissed a writ of error directed to the Supreme Court of Wisconsin because its decision could be supported on the non-federal ground of *res judicata*, saying:

> "The judgment before us was rendered in accordance with well settled principles of *general law, not involving any Federal question*, . . ." (144 U.S. 458, 465 (1892)).

Furthermore, in *General Talking Pictures Corporation* v. *Western Electric Company, Inc.*, 304 U.S. 175, a case involving the doctrine of *estoppel*, this Court denied certiorari, saying:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are *estopped* depends upon the facts. Granting of the writ *would not be warranted merely to review the evidence or inferences drawn from it.*" (304 U.S. 175, 178).

The Commission seeks to avoid the decision by the Court below, arguing that if the former *North Dakota* case is held to be incorrectly decided by this Honorable Court (in Lo-Vaca) then there should be a change in the "legal atmosphere" which would make the doctrine of collateral estoppel inapplicable (Pet. 9). We respectfully submit that this Court alone—not the Commission—has the power to bring about a change in "legal atmosphere." As the Court below so aptly observed, there has been "no *intervening* change in the prevailing law" (334 F.2d 404, 411). And certainly the Commission's flouting of the 8th Circuit's opinion does not constitute a change in "legal atmosphere" which will bar the application of the doctrine of collateral estoppel. The *Sunnen* case[14] relied on by the Commission, makes it clear that even in tax matters, any change in "legal atmosphere" which might bar the application of the doctrine must be the result of a "*judicial*

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14. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948).

declaration *intervening* between the two proceedings . . ." (333 U.S. 591, 600).

CONCLUSION

We respectfully submit that the Commission's petition is not "certworthy"; we pray that this Honorable Court deny that petition and decline to hold the matter in abeyance pending a determination of *Lo-Vaca*.

Respectfully submitted,

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No. 585

FEDERAL POWER COMMISSION,
Petitioner,
vs.
AMERADA PETROLEUM CORPORATION
and
SIGNAL OIL AND GAS COMPANY,
Respondents.

On Petition and a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR RESPONDENTS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 585

FEDERAL POWER COMMISSION,
Petitioner,

vs.

AMERADA PETROLEUM CORPORATION

and

SIGNAL OIL AND GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING

Amerada Petroleum Corporation (Amerada) and Signal Oil and Gas Company (Signal), Respondents herein, respectfully pray that this Court grant rehearing of its opinion dated February 1, 1965.

A principle which towers over the wrecks of time is that there can be no rehearing until there has been a hearing. Yet today we come before this Honorable Court praying for rehearing when in fact we have never been heard.

We have never been afforded an opportunity to present to this Honorable Court our arguments on the merits—and yet this Court has decided our case on the merits. Are we to be penalized because, instead of arguing the merits, we followed this Court's Rule 24 and directed our arguments to the only question before the Court, which was: Shall certiorari be granted?

We earnestly pray that before this Court reaches a conclusion that our case is "on all fours"[1] with *California v. Lo-Vaca Gathering Company*, ... U.S. .....; it should give us an opportunity to demonstrate why this statement, though no doubt thought by the writer to be correct, is plainly erroneous.[2]

All of the Gas Sold in Lo-Vaca Was Commingled; There Was Not a Separate Split Stream As in the Case at Bar.

In *Lo-Vaca*, this Court pointed out that:

> ". . . the gas sold by Lo-Vaca and Houston to El Paso will flow in a commingled stream with gas from other sources . . .
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> * * *
>
> "The fact that a substantial part of the gas will be resold, in our view, invokes federal jurisdiction at the outset over the entire transaction."[3]

In the case at bar, all Amerada-Signal gas processed at the Tioga plant "will, as it has in the past continue to be divided into two gas streams upstream from the point of

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1. Slip Opinion 585, p. 3.

2. The Commission's brief on the *merits* in *Lo-Vaca* was comprehensive in scope and presented, from its point of view, all relevant arguments and authorities. This, we have not had opportunity to do.

3. Slip Opinions 46, 47 and 57, pp. 2 and 4

delivery and measurement" (R. 3). Of the 55,000 Mcf delivered on a peak winter day, only 5,000 Mcf will flow west and 50,000 Mcf will flow east. Of the 45,000 Mcf delivered on an average summer day, 13,000 Mcf will flow west and 32,000 Mcf will flow east (R. 8, 29).

It is an undisputed fact, *conceded* by the Commission, that *absolutely none* of the Amerada-Signal gas which flows to the *east* from Tioga will be commingled with the Hunt-Herbert and TXL gas, *all* of which flows to the *west* (Pet. 6; R. 7, 13, 29). Thus, even assuming *arguendo* that the Amerada-Signal gas which flows to the *west*, and which is commingled with Hunt-Herbert and TXL gas, is converted into a jurisdictional sale because of the commingling, this conclusion is clearly invalid as to the gas going *east* where there is no commingling.[4]

Every Mcf of the eastward flowing gas will be Amerada-Signal gas. Every Mcf of eastward flowing gas consumed by the North Dakota towns and communities as the gas travels along its way will be accurately measured and sold under the North Dakota Contracts. Every Mcf of eastward flowing gas which is not consumed as it travels along its way into Montana will be sold under the Amerada-Signal Interstate Contracts. Thus, contrary to *Lo-Vaca*, the factual situation is identical with the factual situation which obtained in *North Dakota* v. *Federal Power Commission*.[5] This is the situation which Mr. Justice Goldberg said "we need not and do not reach."[6] We respectfully submit that this statement is incorrect; the question must be "reached" and resolved.

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4. If this Court grants rehearing we will also demonstrate why the gas flowing west which is sold under the North Dakota Contracts is not subject to Commission jurisdiction.

5. 247 F.2d 173.

6. Slip Opinion 585, p. 4.

We do not have a "conjured up" factual situation which this Court alluded to in *Lo-Vaca*.[7] Instead we have a real live factual situation which does involve proportionate sharing. On a peak winter day the 50,000 Mcf of Amerada-Signal gas going east is *not* commingled with even so much as *one* Mcf of Hunt-Herbert or TXL gas going west. All of this gas is *wholly consumed* in North Dakota by consumers who were crying for the gas and who were urging that the new 106-mile line between Minot and Bismarck be constructed. This gas, consumed entirely within the State of North Dakota, is sold under the separate North Dakota Contracts. Absent commingling it cannot be a jurisdictional sale.

In the summertime those volumes of gas going to the east which are not metered off en route and which ultimately pass into Montana are sold under the Interstate Contracts, for by their very terms they cover "all gas . . . transported outside of the State of North Dakota and resold." (R. 105). But that gas flowing east which is not commingled, which is sold under a *separate* intrastate (North Dakota) contract, which is accordingly measured and consumed all within North Dakota cannot, we submit, be a sale in interstate commerce for resale. The "engineering and scientific" rationale of *Lo-Vaca* cannot apply;[8] none of the Hunt-Herbert or TXL molecules are present in the eastern pipeline—they are all moving to the west.

The Underlying Policy Considerations Which Persuaded This Court in Lo-Vaca Have No Application to the Case at Bar.

In 1951, Amerada drilled the first discovery well in North Dakota. This led to the discovery of the sizeable oil

7. Slip Opinions 46, 47 and 57, p. 5.

8. Slip Opinions 46, 47 and 57, p. 3.

and gas reserves which are known to exist in that state today. Amerada has supplied over the years a large amount of gas to both local and interstate consumers. Because of their willingness to make these gas supplies available—not as compressor fuel to a pipeline, but to consumers—Amerada and Signal entered into negotiations with MDU to satisfy a desperate consumer need for gas in a part of the world which has a reputation for being inordinately cold.

Recognizing that the "wealth of Midas and the wit of man cannot produce or reproduce a natural gas field,"[9] knowing that some of these volumes would be sold, transported and consumed *wholly within the state,* and knowing that the policy of the law permits intrastate transactions, Amerada and Signal first entered into the intrastate North Dakota Contracts. Also knowing that some of these gas volumes would be transported *beyond* the boundaries of the state, they also entered into separate interstate contracts and with respect to these sales, it is admitted that the Federal Power Commission has jurisdiction.

No one can deny that if a separate intrastate pipeline had been built to supply the North Dakota consumers with North Dakota gas, such sales would have been intrastate in character and clearly non-jurisdictional. Such a wasteful duplication of dollars and energy was avoided, however, by the two kinds of contracts which were entered into.[10] The legitimacy of these contracts, the legitimacy of the business purpose, and the vital need to get this gas on stream to the gas consumers has never been questioned.

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9. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 629.

10. The cost of a parallel intrastate line would be considerable. That segment of MDU's line running from Tioga to Minot alone, built as an "*intrastate* line" had a "total cost" in excess of 5 million dollars on December 31, 1960 (R. 187).

Indeed, the North Dakota Public Service Commission supported the entire project which included both intrastate and interstate sales (R. 2).

Contrast this to *Lo-Vaca* where the Court challenged the legitimacy of the arrangements there entered into, saying:

> "A pipeline would then be able to discriminate in favor of its 'non-jurisdictional' customers. Moreover, a pipeline company by a contract clause could immunize a particular supplier from the reach of federal regulation.[2]" (Footnote by the Court).[11]

The Court, in its footnote, points out that by this device pipeline companies could pick or choose from their various suppliers eighty-five million dollars worth of gas to be used *as fuel for compressor stations*. But we are not selling gas for compressors; we are selling gas for consumers. We have been supplying the North Dakota markets for many years (R. 11). Thus, we say again: the policy reasons, the facts, the legal principles, simply are not parallel in these two cases.

Further, there is no "attractive gap" which this Court found to exist in *Lo-Vaca*. Indeed there is *no gap*—attractive or otherwise—in regulation or consumer protection in North Dakota.[12] At no time in these proceedings until we reached this Court did the Commission ever make the "attractive gap" argument which this Court found to be ap-

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11. Slip Opinions 46, 47 and 57, p. 4.

12. *Public Service Commission of North Dakota* v. *Montana-Dakota Utilities Company*, 100 N.W.2d 140.

plicable in *Lo-Vaca*. Knowing full well that this argument simply does not exist in the case at bar, it was never made until the Commission sought to "blanket" the case at bar with its argument in its Petition for Certiorari that "the reasons set forth in our brief in *Lo-Vaca*" also apply here (Pet. 9).

CONCLUSION

It has been said that the most difficult task for the advocate is to persuade any court—let alone the highest court in the land—that its judgment or opinion is clearly erroneous. And we are familiar with the statistics relating to the granting of rehearing by this Honorable Court.[13] But those statistics pertain to cases which have in fact been briefed and argued. Because the case at bar has not been *heard* on the merits, it should not be *reversed* on the merits.

We honestly feel that the Court surely did not realize the important fact and policy differences which exist in these two cases. They simply are not "on all fours" and we entreat this Court to give us the opportunity—and that is all we ask—the opportunity to present to you the significant legal and factual distinctions between these two cases. These distinctions, we submit, will show beyond all doubt why *Lo-Vaca* does not control the case at bar.

We pray for rehearing; we pray for an opportunity to brief and argue this case on its merits. In the alternative,

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13. Stern and Gressman, Supreme Court Practice, 3rd Ed., p. 385.

we pray that the Court affirm the Court below with respect to all volumes of Amerada-Signal gas which move to the east from the tailgate of the Tioga plant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph W. Morris, one of the attorneys for Amerada Petroleum Corporation, one of the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of February, 1965, I served five copies of the foregoing Petition for Rehearing upon each of the following parties by air mail, postage prepaid:

Archibald Cox,
Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.

Richard W. Solomon,
General Counsel,
Federal Power Commission,
Washington 25, D. C.

.....,
JOSEPH W. MORRIS.

CERTIFICATE OF COUNSEL

I, Joseph W. Morris, one of the attorneys for Amerada Petroleum Corporation, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....,
JOSEPH W. MORRIS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 585

FEDERAL POWER COMMISSION,
Petitioner,

VS.

AMERADA PETROLEUM CORPORATION,

AND

SIGNAL OIL AND GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING

And he that will not apply New Remedies, must expect New Evils: For Time is the greatest Innovatour.

Bacon, *Of Innovations.*

Amerada Petroleum Corporation and Signal Oil and Gas Company, Respondents herein, respectfully move this Court to grant leave to file the attached Petition for Rehearing of this Court's opinion dated February 1, 1965.

Permission to file this Petition for Rehearing is requested because the Federal Power Commission's decision in *Transcontinental Gas Pipe Line Corporation*, Docket No. CP63-222 (Opinion No. 449) represents a complete turnabout in Commission policy with respect to its jurisdiction over commingled gas. We had not received Opinion 449 when we mailed our original Petition for Rehearing to the printer. But Opinion 449 has a vital and direct bearing on the case at bar because it reflects a new Commission policy applicable to commingling cases. The application of this new doctrine to the facts of our case by a newly constituted Commission, a majority of whose members were not sitting when the case at bar was decided below, would result, we submit, in a total disclaimer of jurisdiction. We therefore respectfully ask this Honorable Court to judge our case in the light of this significant change in Commission thinking. Although Rule 58 does not contemplate the filing of a second petition for rehearing, this Court clearly has the power, in its discretion, to entertain such a petition, *Zap* v. *United States*, 330 U.S. 800 and *United States* v. *Ohio Power Company*, 353 U.S. 98, and we urgently move for leave to file.

Respectfully submitted,

.....

JOSEPH W. MORRIS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 585

FEDERAL POWER COMMISSION,
Petitioner,
vs.
AMERADA PETROLEUM CORPORATION,
AND
SIGNAL OIL AND GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING

By leave of this Court, Amerada Petroleum Corporation (Amerada) and Signal Oil and Gas Company (Signal), Respondents herein, respectfully file this Petition for Rehearing of this Court's opinion dated February 1, 1965.

REASONS FOR GRANTING REHEARING

The Federal Power Commission's recent decision in Transcontinental Gas Pipe Line Corporation, Docket No. CP63-222 (Opinion No. 449) represents, so far as principle is concerned, a 180 degree reversal in policy concerning the legal effect of gas commingling. Although the Commission

attempts to distinguish certain of the commingling cases from its Opinion 449, a reading of that opinion, which is printed in the Appendix hereto, clearly demonstrates that the Commission has taken an approach which is diametrically opposed to the approach taken by the Commission when the case at bar was before it.

In Opinion 449, Texaco, Inc. (Texaco) entered into a contract with Transcontinental Gas Pipe Line Corporation (Transco) whereby Texaco would deliver daily, certain quantities of gas owned by it to Transco at two points of delivery in the Gulf Coast area of Texas and Louisiana. The Texaco gas was to be *commingled* in the Transco line with gas sold *in interstate commerce*. A volume of gas equivalent to the volume delivered by Texaco was to be redelivered by Transco to Texaco in New Jersey for use in Texaco's refinery. "It is the intention of the parties that the daily deliveries of gas by Texaco for transportation shall approximately equal the amount of gas which Texaco shall receive at the New Jersey delivery point. Under Article 8 of the agreement, the parties recognize that the gas delivered by Texaco *will be commingled* with gas received from *other sources* in Transco's pipeline." (App. p. A5).[1]

With these facts before it the Commission concluded that:

> ". . . the *mere physical commingling* of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale does *not* compel rejection of historic notions of bailments and require us to transform the transportation agreement into a succession of sales by Texaco to Transco and again by Transco to Texaco. An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. It has merely contracted for conventional transportation arrangements subject to

1. All emphasis contained herein is supplied by the writers unless otherwise indicated.

> the Commission's jurisdiction. While transfers of gas from a producer to a pipeline or from a pipeline to a direct customer may be treated as a sale for regulatory purposes in appropriate circumstances, we see no reason to do so in the circumstances of this case where it is clear that the intermediate transactions result in returning the gas to the original producer-owner and *no jurisdictional question is involved.*" (App. p. A7).

Contrast this holding to the Commission's rationale in the case at bar; it is remarkable. For in our case the Commission's singularly important reason for holding our intrastate sales under our North Dakota Contracts to be jurisdictional was that the gas sold thereunder was *commingled* with jurisdictional gas from *other sources*. The majority of the Commission put it this way:

> "There is, however, a distinction in the present case which, even though not mentioned as such by the examiner, is clearly apparent from his discussion. This is the fact that here the Amerada and Signal gas is *now commingled* with gas from Texaco and Hunt-Herbert *admittedly sold in interstate commerce*, so that it can no longer be stated with certainty that all of the gas sold in North Dakota came from Amerada and Signal. Indeed, it is apparent that a portion of the Amerada and Signal gas is transported and sold to purchasers within Montana while some of the Texaco and Hunt-Herbert gas is used within North Dakota." (R. 249-250).

Thus today, almost two years after the Commission's decision below in the case at bar, the Commission's view of the effect of commingling has completely changed. For today, the delivery and commingling of non-jurisdictional gas with interstate gas in the Transco pipeline and the redelivery by Transco to Texaco of an equivalent volume of gas in New Jersey does not convert the non-jurisdictional gas into jurisdictional gas. Indeed the Commission regards the separation of this non-jurisdictional gas, though it is

commingled with jurisdictional gas, to be so complete that it refers to "*the gas*" which is delivered in Texas as being "*the gas*" which is redelivered in New Jersey. It says:

> "An essential feature of this transaction is that Texaco is the owner of *the gas* both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption.
>
> * * * *
>
> "'. . . it is clear that the intermediate transactions result in returning *the gas* to the original producer-owner and no jurisdictional question is involved." (App. p. A7).

We respectfully submit, and it cannot be logically refuted, that if "the gas" delivered to Transco in Texas is "the gas" redelivered in New Jersey, commingled though it was en route with jurisdictional gas from other sources, then "the gas" delivered by Amerada and Signal at the tailgate of the Tioga, North Dakota, plant under the North Dakota Contracts is "the gas" metered off and delivered to the North Dakota towns as it travels to the west; commingling with the Texaco and Hunt-Herbert gas en route does not and cannot convert it into a jurisdictional sale. We respectfully submit that the principle involved is precisely the same; these cases simply cannot be distinguished on principle.

When the Commission handed down its opinion below in the case at bar, it was sharply divided, with three (3) of the Commissioners holding that the sales were jurisdictional and two (2) of the Commissioners holding that they were not (R. 242-265). Commissioner Howard Morgan voted with the majority in Opinion 395 which was handed down on July 15, 1963. Subsequent thereto, but prior to the Order Denying Application for Rehearing entered on September 10, 1963, Commissioner Morgan was succeeded by Commissioner Black. Commissioner Black did not participate in the Order Denying Application for Rehearing (R. 284-285).

On March 20, 1965, President Johnson appointed Mr. Carl E. Bagge as a new member of the Commission. Today, therefore, only two (2) members of the Commission as presently constituted have held that the Amerada and Signal sales under the North Dakota Contracts are jurisdictional.

We respectfully submit that in view of the new commingling pronouncement made in Opinion 449, it is only reasonable to believe that the Commission would now hold the Amerada and Signal North Dakota sales to be non-jurisdictional. Because of this new turn of events and in view of the fact that Opinion 449 was not available to us when we filed our first Petition for Rehearing, we respectfully pray that this Honorable Court grant rehearing in the case at bar and afford us the opportunity to brief and argue this case in light of this vitally important new turn of events. If, notwithstanding this important change in Commission attitude, this Honorable Court is still of the opinion that rehearing should not be granted, we respectfully pray that instead of reversing this case outright, that the case be remanded to the court below with instructions to remand the case to the Commission for decision anew in view of its most recent pronouncement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph W. Morris, one of the attorneys for Amerada Petroleum Corporation, one of the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of March, 1965, I served five copies of the foregoing Motion for Leave to File a Second Petition for Rehearing and Petition for Rehearing upon each of the following parties by air mail, postage prepaid:

Archibald Cox
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Richard W. Solomon
General Counsel
Federal Power Commission
Washington 25, D. C.

.....

JOSEPH W. MORRIS

CERTIFICATE OF COUNSEL

I, Joseph W. Morris, one of the attorneys for Amerada Petroleum Corporation, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....

JOSEPH W. MORRIS

APPENDIX

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L.J. O'Connor, Jr., Charles R. Ross and David S. Black.

Transcontinental Gas Pipe Line Corporation	Docket No. CP63-222

Opinion No. 449
Opinion and Order Granting Certificate

(Issued February 17, 1965)

ROSS, Commissioner:

This is a proceeding under Section 7 of the Natural Gas Act. Transcontinental Gas Pipe Line Corporation (Transco) seeks a certificate of public convenience and necessity to transport gas owned and produced by Texaco Inc., in volumes of 8,000 Mcf per day of firm gas and up to 16,000 Mcf per day of interruptible gas, from two points of receipt in the Gulf Coast area of Texas and Louisiana to a point of delivery on Transco's system near Texaco's Eagle Point Refinery located at Westville, Gloucester County, New Jersey, by means of Transco's main line facilities connecting these two areas. Texaco plans to convert the refinery from the use of fuel oil to natural gas in order to lower operating costs. The initial rates proposed by Transco are the same rates as those charged Sun Oil Co. for similar transportation service. The firm rate is the contract demand rate for Zone 3, exclusive of the

average cost of purchased gas. The interruptible rate is 22 cents per Mcf. Overall, the service would earn an incremental return of over 12½ per cent.

In connection with the proposed service Transco requests authority for the construction and operation of additional pipeline facilities consisting of 10.5 Miles of 8 inch purchase lateral in southeast Louisiana, two gathering meter and regulator stations at the points of receipt and a sales meter and regulator station at the point of delivery. The additional facilities required are estimated to cost approximately $600,000. Other facilities originally requested in this proceeding have since been authorized by the order issued April 17, 1964, in *Transcontinental Gas Pipe Line Corporation*, Docket No. CP64-96.

On June 5, 1964, Presiding Examiner Dyer Justice Taylor issued an initial decision granting Transco's application subject to certain specified conditions regarding curtailments and priority of service. Transco, in its brief opposing exceptions, indicates that the conditions imposed by the examiner are deemed appropriate and are acceptable to it.

Exceptions to the examiner's decision were filed jointly by and on behalf of seven intervening local gas distribution companies[1] and by the Board of Public Utility Commissioners of the State of New Jersey, which adopted the exceptions and the reasons stated in the joint brief on exceptions filed by the distribution company intervenors. The Commission's staff, which supported the award of the certificate to Transco, did not except to the

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1. City Gas Company of New Jersey, Elizabethtown Consolidated Gas Company, New Jersey Natural Gas Company, Philadelphia Electric Company, Philadelphia Gas Works Division of The United Gas Improvement Company, Public Service Electric and Gas Company, and South Jersey Gas Company.

intermediate decision. By order of August 25, 1964, the Commission scheduled oral argument on the issues raised by exceptions to the examiner's initial decision. These issues were directed to whether the proposed transportation was required by the public convenience and necessity. In addition, the Commission raised *sua sponte* an issue relating to the nature of the transaction between Transco and Texaco and provided for the filing of briefs on this issue. Specifically, the issue raised was:

> "Whether the arrangement between Texaco and Transco involves a sale of gas by Texaco to Transco for resale by the latter so that the producer should be required to secure a certificate."

At the oral argument and in the supplemental briefs, Transco and Texaco contended that the so-called commingling doctrine of the Commission had been rejected by both the Fifth and Eighth Circuits.[2] Moreover, they argued that this doctrine had been applied only to determine whether or not what was admittedly a sale by the producer in the first instance, was a sale for resale in interstate commerce. This situation is distinguishable, they point out, in that the transaction concededly is in interstate commerce. After describing the several transportation agreements previously approved by the Commission, these parties argued that public policy dictated against expanding the commingling doctrine to cases of this type.

Staff and the New Jersey intervenors[3] took a contrary view of the nature of the transaction between Transco and Texaco. In their view, the instant agreement comprised a sale in the field by Texaco to Transco, and a resale in Westville, N.J. by Transco to Texaco. Under the Com-

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2. *LoVaca Gathering Company* v. *FPC*, 323 F.2d 190 (1964); *Amerada Petroleum Corporation* v. *FPC*, 334 F.2d 404 (1964).

3. These parties are identified in footnote 1, *supra*.

mission's commingling doctrine, they indicate that physically a part of the gas initially delivered by Texaco to Transco will be resold by Transco to various of its wholesale customers served by its main line facilities. In support of this position, they note that Transco, under the agreement, bears the risk of loss while the gas is in transit, except for loss due to force majeure. The New Jersey intervenors argued various points indicating, in their opinion, why the proposed arrangement was not consistent with the public interest.

We conclude that the transaction between Transco and Texaco is a transportation agreement and that the public convenience and necessity requires certification of the proposed transportation service under Sections 7(c) and 7(e) of the Natural Gas Act.

The part of the Natural Gas Act covering the issue raised *sua sponte* is Section 7(c) which provides:

> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations"

Considering the fact that the pipeline industry had evolved to a considerable extent by the time Congress enacted the Gas Act, it is noteworthy that the term "transportation" was specifically included. In the past, the Commission has approved several transportation arrangements of a type similar to that presented here. At the present time, there are 25 transportation rate schedules on file with the Commission by 13 different pipelines.

Under the agreement executed by Transco and Texaco, and filed herein as Exhibit No. 8 Transco agrees to transport for Texaco daily from points of delivery in the Gulf Coast area to the Westville plant in New Jersey such quantities of gas on a firm basis as Texaco makes available to such delivery points up to 8,000 Mcf per day, and up to 16,000 Mcf per day on an interruptible basis. Departure from scheduled daily deliveries due to the inability of the parties to maintain precise control must be kept to the minimum and balanced out as soon as practicable. It is the intention of the parties that the daily deliveries of gas by Texaco for transportation shall approximately equal the amount of gas which Texaco shall receive at the New Jersey delivery point. Under Article 8 of the agreement, the parties recognize that the gas delivered by Texaco will be commingled with gas received from other sources in Transco's pipeline. However, the parties agree that the quantity of the gas delivered by Transco to Texaco shall be comparable to that initially delivered by Texaco. Article 9 provides detailed measuring requirements respecting both the quantity and quality of the gas delivered by Texaco to Transco and redelivered by Transco to Texaco. Of course, these contractual provisions do not control our jurisdictional determination.[4]

Transco is not liable for any gas gathering, occupation or production, severance or sales tax or taxes of similar nature presently or hereafter validly imposed. In addition, Texaco is obliged to reimburse Transco in the amount of any future tax validly paid by Transco incurred in connection with the proposed transportation. Under Article 10, the parties agree to share the loss of any gas resulting

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4. 26 FPC 606. The Commission's decision was recently sustained by the Supreme Court in *California* v. *LoVaca Gathering Co., et al.*, U.S. , Docket Nos. 46, *et al.*, decided Jan. 18, 1965.

from force majeure. Otherwise, the agreement places the risk of loss with Transco. Texaco warrants clear title to the gas to be delivered to Transco and Transco warrants that the gas shall be free of all liens when delivered to Texaco. Nothing in the agreement purports to transfer title to the gas delivered by Texaco to Transco. Texaco receives no consideration whatever under the agreement. The only obligation is Texaco's obligation to pay the agreed rate to Transco in return for the transportation of gas of a specified volume and quality.

The terms of this agreement conform generally to other transportation agreements we have approved. Texaco simply desires to transport gas it owns and has developed to a point where it can economically use the gas. It therefore has entered an arrangement with one who has the facilities capable of transporting the gas. We conclude that in the light of the facts of this case, the instant situation does not involve a sale by Texaco to Transco.

Staff and the New Jersey Intervenors argue that our decision in *LoVaca* requires us to view the instant transaction as one involving a sale by Texaco to Transco and a (nonjurisdictional direct industrial) resale by Transco to Texaco. In essence, Staff reaches this conclusion on the basis of commingling, i.e., different molecules of gas being redelivered by Transco to Texaco. We disagree with this position.[5]

Initially, we note that the issue present in *LoVaca*, *supra*, was whether arrangements, which concededly were sales, were in interstate commerce or for resale, and hence subject to Federal regulation under the Natural Gas Act.

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5. Footnote 4, *supra*. See also *FPC* v. *Amerada Petroleum Corp., et al.*, ... U.S. ..., Docket No. 585, per curiam opinion decided February 1, 1965.

The issue here, on the other hand, is whether in the circumstances of this case there is any sales relationship between Texaco and Transco which is subject to Commission jurisdiction as such, or whether the proposed transaction is a transportation service under Sections 4, 5 and 7 of the Act.

We conclude that the mere physical commingling of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale does not compel rejection of historic notions of bailments and require us to transform the transportation agreement into a succession of sales, by Texaco to Transco and again by Transco to Texaco. An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. It has merely contracted for conventional transportation arrangements subject to the Commission's jurisdiction. While transfers of gas from a producer to a pipeline or from a pipeline to a direct customer may be treated as a sale for regulatory purposes in appropriate circumstances, we see no reason to do so in the circumstances of this case where it is clear that the intermediate transactions result in returning the gas to the original producer-owner and no jurisdictional question is involved. In reaching this determination we do not decide the status of the other types of transactions, such as that presented in the X-20 case.[6]

LoVaca raised the possibility of a situation whereby substantial volumes of gas moving in interstate commerce would escape federal regulatory authority. Under the proposal, a pipeline would have been able to discriminate in favor of "nonjurisdictional" customers and could immunize a particular supplier from the reach of federal regulation. In these and in other ways, the Supreme Court

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6. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1.

noted, an attractive gap in the federal regulatory scheme would be created. Such a danger is not present in this case. The Commission has full and complete authority over the transportation agreement, and Texaco could not inject one Mcf of gas into Transco's interstate pipeline unless the Commission is satisfied that the transportation service is required by the public interest.

We have reviewed the record in this proceeding and conclude that the proposed service is required by the public convenience and necessity within the meaning of Sections 7(c) and 7(e) of the Gas Act. In our view, the presiding examiner properly treated these issues and we will therefore adopt this decision.

There are certain beneficial features of this transaction that we wish to emphasize. The present transaction precludes triggering of Transco's gas purchase contracts covering gas produced in Texas which might otherwise occur under a typical gas purchase contract. In addition, the instant arrangement allows the parties considerable operating flexibility in that specific leaseholds are not dedicated. The proposed service also will benefit Transco's other jurisdictional customers from a cost standpoint. The record indicates that the jurisdictional transportation revenues will exceed the associated incremental costs by about $600,000 annually.

None of the foregoing benefits would be available to Transco's jurisdictional customers if the proposed transaction were viewed as a sale from Texaco to Transco and a resale back to Texaco. The latter would be a nonjurisdictional direct industrial sale and hence immune from consideration in a rate proceeding.

On November 18, 1964, Public Service Electric and Gas Company, one of the intervenors in this proceeding,

filed a document entitled "Offer of Settlement and Reasons for Acceptance". In this document, Public Service requested the Commission to order an informal settlement conference which would permit Public Service to offer a rate designed to meet the conditions of service satisfactory to Texaco and Transco. Public Service also suggested that it could offer a resale price of 42.9 cents per Mcf to Texaco. As Texaco correctly pointed out in its answer in opposition, Public Service's request is nothing more than an attempt to present an entirely new affirmative case almost one year after the record has been closed and the case briefed and submitted for decision. In addition the rate suggested by Public Service, even if reliable, is unsatisfactory to parties. For these reasons, we shall deny the relief requested by Public Service.

The Commission orders:

(A) The presiding examiner's decision and order issued herein on June 5, 1964, is hereby adopted as the decision of the Commission with respect to the public interest aspects of the application.

(B) The exceptions to the examiner's decision are hereby denied.

(C) The relief requested by Public Service Electric & Gas Co. in its "Offer of Settlement" filed November 18, 1964, is denied.

By the Commission. Commissioner O'Connor concurs in the result.

(SEAL)

Joseph H. Gutride,
Secretary.